(18,465.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 282.

ANTON JOHANSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF WASHINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1902.

a No. 3670.

Filed July 10, 1900. C. S. Reinhart, Clerk, by R. B. Crandall, Deputy.

b THE STATE OF WASHINGTON, Plaintiff, Respondent,
vs.
ANTON JOHANSON, Defendant, Appellant. } No. 27377.

Appeal from the superior court of King county to the supreme court of the State of Washington.

1 In the Superior Court of the State of Washington in and for King County.

THE STATE OF WASHINGTON, Plaintiff,
vs.
ANTON JOHANSON, Defendant. } Summons.

State of Washington to the said Anton Johnson, above-named defendant, Greeting:

You are hereby summoned and required to appear within twenty days after the date of the service of this summoned upon you, exclusive of the day of such service and answer the complaint and defend the above-entitled action in the above-entitled court and to serve a copy of your answer or other pleading upon P. H. Winston, attorney general or Thos M. Vance assistant attorney general, attorneys for plaintiff at their post-office address hereinbelow stated and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, a copy of which is herewith served upon you.

Dated this 24 day of May, 1899.

P. H. WINSTON,
Attorney General,
By THOS. M. VANCE,
Assistant Attorney General,
Attorneys for Plaintiff.

Post-office address Spokane Washington, Olympia Washington.

2 In the Superior Court of the State of Washington in and for the County of King.

THE STATE OF WASHINGTON, Plaintiff,
vs.
ANTON JOHANSON, Defendant. } No. —. Complaint.

The plaintiff complains and alleges:

I.

That on the 12th day of March, 1893 it was seized in fee and possessed and entitled to the possession of that certain tract of land

situated in the county of King, State of Washington, described as follows, to wit:

The north half (N. ½) of the southwest quarter (S. W. ¼) and the northwest quarter (N. W. ¼) of the southeast (S. E. ¼) quarter of section three (3) of township twenty-five (25) north of range four (4) east which said land is of the value of twenty thousand ($20,000.00) dollars.

II.

That while said plaintiff was so possessed the defendant on the 12th day of March, 1893, and without right or title entered into possession of the *defendant* premises and ousted and ejected the plaintiff therefrom and now unlawfully retains the possession thereof from the plaintiff to its damage in the sum of one hundred ($100.00) dollars.

3

III.

That the value of the rents, issues and profits of said premises from the said 13th day of March, 1893, and all the plaintiff has been entitled to therefrom in one hundred ($100.00) dollars.

Wherefore plaintiff prays judgment against the defendant for the recovery of the possession of the defended premises.

2. For the sum of one hundred ($100.00) dollars the value of the rents, issues and profits thereof and the costs of this suit.

THOS. M. VANCE,
Attorney for Plaintiff.

4 STATE OF WASHINGTON, } ss:
County of Thurston, }

Thos. M. Vance being duly sworn, upon oath deposes and says that he is assistant attorney general of the State of Washington; that he has read the foregoing complaint knows the contents thereof and believes the same to be true.

THOS. M. VANCE.

Subscribed and sworn to before me this 27 day of June, 1899.

C. W. CORLISS,
Notary Public in and for the State of Washington,
Residing at Seattle, Wash.

I, Thos. M. Vance one of the attorneys for the plaintiff, do hereby certify that the within and foregoing are true and correct copies of the original complaint and summons herein.

Dated this — day of ——, 1898.

THOS. M. VANCE,
Assistant Attorney General, One of the
Attorneys for the Plaintiff.

Filed Jul- 10 1899.
GEO. M. HOLLOWAY, *Clerk.*

Received a copy of the within summons and complaint this 27 day of June, 1899 and hereby appear in said cause for defendant Anton Johanson.

CORLISS & McKAY,
Att'ys for Defendant.

5 In the Superior Court of the State of Washington in and for King County.

THE STATE OF WASHINGTON, Plaintiff,
vs.
ANTON JOHANSON, Defendant. } No. 27377. Answer.

The defendant for answer to the complaint herein

I.

Denies the allegations made in paragraph I of the complaint.

II.

Denies the allegations made in paragraph II of the complaint.

III.

Denies the allegations made in paragraph III of the complaint.

Wherefore the defendant prays judgment that the action be dismissed and that he recover his costs and disbursements to be taxed.

CORLISS & McKAY,
Attorneys for Defendant,
317 *Bailey Building, Seattle, Wash.*

6 STATE OF WASHINGTON, } *ss:*
County of King, }

Anton Johanson being first duly sworn, on oath deposes and says: That he is the defendant in the above-entitled action; that he has heard read the foregoing answer, knows the contents thereof and verily believes the same to be true.

ANTON JOHANSON.

Subscribed and sworn to before me this 26th day of July, 1899.

ROB'T J. FISHER,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of a copy of the within answer admitted this 27th day of July, 1899.

THOS. M. VANCE,
Att'y for Plaintiff.

Filed Sep. 25, 1899.

GEO. M. HALLOWAY, *Clerk.*

7 In the Superior Court of the State of Washington in and for King County.

STATE OF WASHINGTON, Plaintiff,
vs.
ANTON JOHANSON, Defendant. } Findings and Decree.

This cause coming on regularly to be heard plaintiff being represented by T. M. Vance and defendant being represented by Corliss a McKay a jury having been waived by a stipulation signed by the parties hereto and the cause having been submitted to the court upon an agreed statement of facts contained in a stipulation signed by the parties to this cause. The cause having been submitted to the court for its decision, the court now finds the following facts:

1. That the north half of the southwest quarter and the northwest quarter of the southwest quarter of section 3 township 25 north range 4 east is of the value of twenty thousand dollars and was selected by Phillip H. Lewis as agent for King county, Washington Territory, by filing a list of this and other lands designated as list No. 2 of indemnity school selection at the land office at Olympia Washington Territory May 24th, 1870, under an act of Congress approved March 2nd, 1853, and an act of Congress approved February 26th 1859 which said selection was approved by Secretary C. Delano January 27th, 1872.

2. March 13th, 1893, Anton Johanson made application to enter the land aforesaid under the homestead laws, and at that time made a settlement thereon; he has ever since lived on said land, his application was rejected by the local land office and subsequently

8 appealed to the Commissioner of the General Land Office, and finally to the Secretary of the Interior who on December 18th, 1895, decided adversely to Anton Johanson.

From the foregoing facts the court finds as conclusions of law:

1. That the plaintiff was on the 13th day of March, 1893, seized in fee, and possessed and entitled to the possession to, said north half of the southwest quarter and the northwest quarter of the southeast quarter section 3 township 25 north range 4 east.

2. That on the said 13th day of March, 1893, defendant unlawfully entered said premises and ejected the plaintiff therefrom, and unlawfully retains possession thereof.

To each of the foregoing conclusions of law defendant excepted which exceptions were allowed.

Wherefore by virtue of the law and by reason of the premises aforesaid it is ordered, adjudged and decreed that plaintiff have and recover of defendant the possession of the aforesaid premises, together with his costs taxed at $—.

Dated this 21st day of April 1900.

WM. HICKMAN MOORE, *Judge.*

Filed Apr. 21 1900.

GEO. M. HOLLOWAY, *Clerk.*

9 In the Superior Court of the State of Washington in and for King County.

STATE OF WASHINGTON, Plaintiff,
vs.
ANTON JOHANSON, Defendant. } Exceptions.

1.

Defendant excepts to all and every part of the conclusions of law number one on the ground that the same is contrary to the law and the evidence herein.

2.

Defendant excepts to all and every part of the conclusions of law number two on the ground that the same is contrary to the law and evidence herein.

The foregoing exceptions allowed this 21st day of April, 1900.

WM. HICKMAN MOORE, *Judge.*

Filed Apr. 21 1900.
GEO. M. HOLLOWAY, *Clerk.*

10 In the Superior Court of the State of Washington for the County of King.

STATE OF WASHINGTON
vs.
ANTON JOHANSON.

APRIL 21ST, 1900.

Findings and decree signed. Exceptions signed.

At the time of signing said findings and decree, the defendant gives notice in open court that he appeals from said decree and every part thereof to the supreme court of the State of Washington.

WM. HICKMAN MOORE, *Judge.*

10½ In the Superior Court of the State of Washington for King County.

THE STATE OF WASHINGTON, Plaintiff,
vs.
ANTON JOHANSON, Defendant. } No. —. Appeal Bond (Civil).

STATE OF WASHINGTON,
County of King, } *ss:*

Know all men by these presents: that we, Anton Johanson as principal and Gust Eckloff and H. Stillson as sureties are held and firmly bound unto the State of Washington in the penal sum of two hundred and fifty dollars for the payment of which sum, well and truly to be made, we do bind ourselves and each of our heirs, executors and administrators, jointly and severally firmly by these presents:

The condition of the foregoing obligatian is such that whereas on the — day of April, A. D. 1900 in the above-named court, the above-bounden principal gave due notice of appeal to the supreme court of the State of Washington from the judgment rendered in favor of plaintiff by the superior court of King county, State of Washington in the above-entitled cause therein pending and desires to stay proceedings under said judgment until the determination of said appeal therefrom

Now therefore if the said Anton Johanson shall pay to the above-named plaintiff all costs and damages that shall be adjudged against him on said appeal, and shall satisfy and perform the judgment appealed from in case it shall be affirmed and any judgment
11 or order which the supreme court may render or order to be rendered by said superior court not exceeding in amount the sum of two hundred and fifty dollars then this obligation shall become void, otherwise it shall remain in full force and effect.

ANTON JOHANSON, *Principal.*
GAST ECKLAFF, [SEAL.]
H. STILLSON, *Sureties.* [SEAL.]

STATE OF WASHINGTON, } ss:
County of King, }

H. Stillson and Gust Ecklaff being first duly sworn each for himself on oath says: I am a resident of the State of Washington I am not a counsellor or attorney at law, sheriff, clerk of the superior court or other officer of such court, and am worth the sum of five hundred dollars over and above all debts and liabilities, and exclusive of property exempt from execution.

GUST ECKLAFF.
H. STILLSON.

Subscribed and sworn to before me this 16th day of April, 1900.

C. W. CORLISS,
Notary Public in and for Washington, Residing at Seattle.

Filed Apr. 24, 1900.
GEO. M. HOLLOWAY, *Clerk.*

Received copy of the within bond this 16th day of April 1900 at Olympia W'n.

THOS. M. VANCE,
Ass't Att'y Gen.

12 STATE OF WASHINGTON, } ss:
County of King, }

I, Geo. M. Holloway, county clerk of King county and *ex officio* clerk of the superior court of the State of Washington, for the county of King, do hereby certify that the foregoing is a true and correct transcript of so much of the record in cause No. 27377, as I am required by appellant to transmit to the supreme court on appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 15th day of June, A. D. 1900.

[Seal of the Superior Court of King County.]

GEO. M. HOLLOWAY, *Clerk*,
By A. F. RAYMOND,
Deputy Clerk.

Cancelled inter. revenue stamp.

13 THE STATE OF WASHINGTON, Respondent, vs. ANTON JOHANSON, Appellant. } No. 3670. Filed Dec. 19, 1901.

This was an action brought by the State of Washington to recover from the appellant the possession of a certain tract of land lying in King county. In its complaint the State alleges in substance that it is seized in fee, entitled to the possession, and was on the 12th day of March, 1893, in possession, of the land in controversy, and that the appellant, on the date named, without right or title, entered into the possession of the land, ousted the State therefrom, and unlawfully retains possession thereof. The answer is a general denial. At the trial the facts were stipulated, and appear in the findings of fact made by the trial court. These findings are as follows:

"1. That the north half of the southwest quarter and the northwest quarter of the southwest quarter of section 3 township 25 north range 4 east is of the value of twenty thousand dollars and was selected by Phillip H. Lewis as agent for King county, Washington Territory by filing a list of this and other lands designated as list No. 2 of indemnity school selection at the land office at Olympia Washington Territory May 24th, 1870 under an act of Congress approved March 2nd, 1853 and an act of Congress approved February 26th 1859 which said selection was approved by Secretary C. Delano January 27th, 1872.

2. March 13th, 1893 Anton Johanson made application to enter the land aforesaid under the homestead laws, and at that time made a settlement thereon; he has ever since lived on said land, his application was rejected by the local land office and subsequently appealed to the Commissioner of the General Land Office, and finally to the Secretary of the Interior who on December 18th, 1895 decided adversely to Anton Johanson."

The sole question presented by the record therefore is, has the State such title to the lands in controversy as will enable it to recover possession from one who has entered into its possession without right. And in considering this question, it must be borne in mind

14 that in this State it is not an essential prerequisite to the right of recovery in this form of action that the claimant show a legal title. While the action is in form assimilated to the old action of ejectment, it is in its nature a statutory action, in which the rights of the respective claimants, both legal and equitable are tried and determined, and the superior title, whether legal or equitable, is allowed to prevail. (Ballinger's Code, sec. 5500, 5508.)

The State asserts title to the land under the several acts of Congress reserving for its use, and granting to it, certain parts, of the public domain for the support of its common schools. The first of these is found in the act creating the Territory of Washington. 10 Stat. p. 172. By section 20 of that act, it is provided:

"That when the land in said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory. And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the county commissioners of the counties in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands to an equal amount in sections, or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied as aforesaid."

The next is the act of February 26, 1859; 11 Stat. p. 285. That act was applicable to all of the Territories. It enacted that where settlements were made with a view to pre-emption upon the public lands in advance of the surveys which should be found to have been made upon sections 16 or 36, such lands should be subject to the pre-emption claims of the settlers; and that other lands of like quality should be reserved for the use of the common schools, to be selected "in accordance with the principles of adjustment and the provisions of the act of Congress of May 20th, 1826." Lastly, by act of February 22, 1889, enabling the people of the Territory of Washington to form a constitution and State government, "and to be admitted into the Union on an equal footing with the original States."

By the 10th section of the latter act, it is provided:

"That upon the admission of each of said States into the Union, sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, that the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act, until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain."

And by section 4 of the act it was provided that the convention

elected to frame a constitution, should provide, by ordinance, irrevocable without the consent of the United States and the people of the State, that provision be made for the establishment and maintenance of a system of public schools free from sectarian control, which should be open to all the children of the State. This requirement was complied with by making the provision a part of the fundamental law. Const. art. XXVI, sub. 4.

The contention of the appellant is that the acts of March 2, 1853, and February 26, 1859, did no more than reserve from entry under the land laws of the United States the several tracts of lands therein described, and, as the tenth section of the enabling act, granting lands to the State for the use of its common schools, described only sections 16 and 36 thereof, it was not intended that lands theretofore selected and reserved in lieu of lands lost by reason of settlements made prior to the extension of the surveys should pass to the State by virtue of the grant contained therein; and, hence, whether these selected lieu lands are still reserved from entry by qualified settlers under the existing laws of the United States, or whether they are a part of public domain subject to such entry, can make no difference in the result of this case, as the title to and consequent right of control thereof, is still within the United States, and the State has no such title, either legal or equitable, as will enable it to maintain an action to recover possession.

Looking for a moment to the history of these reservations for and grants of the public domain by the General Government for the use of the public schools, we find that the practice originated in the earliest times. It is said by the Supreme Court of the United States (Cooper *v.* Roberts, 18 How. 173) to be traceable to the ordinance of 1785, which is the first enactment for the disposal by sale of the public lands in the western territory. In that case the court after noticing the ordinance cited, said:

"The appropriation of public lands for that object became a fundamental principle, by the ordinance of 1787, which settled terms of compact between the people and States of the northwestern territory, and the original States, unalterable except by consent. * * * This principle was extended, first, by congressional enactment (1 Stats. at Large, 550, sec. 6.), and afterwards, in 1802, by compact between the United States and Georgia to the southwestern territory. The earliest development of this article in practical legislation, is to — found in the organization of the State of Ohio, and the adjustment of its civil polity, according to the ordinance, preparatory to its admission to the Union. Proposals were made to the inhabitants of the incipient State to become a sovereign community, and to accept certain articles as the conditions of union, which being accepted, were to become obligatory upon the United States. The first of these articles is, 'that the section No. 16 in every township, and when such section has been sold, granted, or disposed of, other lands equivalent thereto and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of schools.'"

That the Government has steadily adhered to this policy, an examination of the several acts admitting States into the Union, will show.

But whether there can be found in the several acts of the Congress above cited relating to the Territory and State of Washington, a compact between the United States and the State "unalterable, except by consent," by which the State is entitled to a grant of the lands in controversy from the United States, if such grant was not made by the enabling act, may be doubted, yet it cannot be doubted that the purpose of such reservations was that the State might have, upon its admission into the Union, sections 16 and 36 of every township within
17 the boundaries of the State, or an equal quantity and quality of land in lieu thereof should it be found that the Government could not, for any reason, grant these particular sections to the State when the State should be so admitted. That it would not be able to grant these particular sections in their entirety, without doing an injustice to certain persons whom it invited and encouraged to move into the Territory, and settle upon the public lands therein, was known to Congress when it passed the act creating the Territory. It was known that such settlers would occupy these lands in advance of the surveys. The injustice of denying to a *bona fide* settler the right to acquire title to land he should so occupy and improve in ignorance of its true location, was so manifest that legislation was necessary for his protection. The purpose of these acts was thus two-fold; it was to protect actual *bona fide* settlers in their settlements, and to preserve to the States a fixed proportion of the public domain for the support of schools and means of education, which the founders of the Government had said "shall forever be encouraged." The conditions anticipated by Congress actually happened. Settlements were made upon the public domain within the Territory prior to the extension of the public surveys over it. Certain of these settlements were found to fall within sections 16 and 36, and the Government, recognizing the settler's prior rights, patented the land to the settler. In lieu of certain lands occupied and lost to the use of the common schools in this way, the board of county commissioners, pursuant to authority expressly granted them by Congress, selected the lands in controversy. This selection was, pursuant to the same authority, approved by the Secretary of the Interior. The lands so selected stood from that time, until the passage of the enabling act withdrawn from settlement, in the place and stead of lands which by that act would without any question have passed to the State under the descriptive terms used in section 10
18 thereof, had they not "been sold or otherwise disposed of."

Why, then, should it be held not to pass under the descriptive terms used in that section? There can be but one reason; namely, the one suggested by the appellant, they are not expressly mentioned. But this is not necessarily conclusive. These acts are public statutes, and are to be construed as such and not as private grants. It is not the rule that acts making grants of the public domain are always to be construed strictly against the grantee. As was said by Mr. Justice Field, in Winona & St. Peter R. R. Co. *v.* Barney, 113 U. S. 618, 625, the acts making grants "are to receive such construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the

grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." And especially is this true where the grant is made in pursuance of a fixed and settled policy of the Government, originated at its foundation, and believed then, and at all times since, to be a policy necessary to the perpetuation of the Government's very existence. Reading all of these acts together, there can be no mistake as to the intent of Congress. It intended these lands for the use of the common schools of the State, and intended to grant them to the State for that purpose when it passed the enabling act. Had it been otherwise, it would not in the first instance have provided for their selection and reservation; nor would it, when it passed the enabling act, have failed to make provision for their disposition, knowing, as it must have known, of their reservation and the purposes for which they were reserved. To contend otherwise is to contend that Congress did not intend to admit the State of Washington into the Union "on an equal footing with the original States." It is also to convict Congress
19 of being ignorant of the history and conditions of the subject-matter over which it was legislating. A reference to the title of the enabling act will show that the first is contrary to the purpose of Congress, and the second is contrary to the rule that ignorance of the status of the subject-matter over which it has legislated can never be imputed to a legislative body.

True these lands have never been patented to the State by the General Government, but such patent is unnecessary to pass the title. If the lands were included in the grant, the equitable title, at least, with the right of possession passed by the grant to the State, which is title sufficient, as we have shown, to enable the State to maintain an action to recover possession from any one intruding thereon.

We conclude, therefore, that the lands in controversy passed to the State by virtue of the grant contained in the enabling act, and that the judgment appealed from must stand affirmed. It is so ordered.

FULLERTON, *J.*

We concur:

REAVIS, *C. J.*
DUNBAR, *J.*
ANDERS, *J.*
WHITE, *J.*

20 In the Supreme Court of the State of Washington.

WEDNESDAY, *January* 29, 1902.

STATE OF WASHINGTON, Respondent,
v.
ANTON JOHANSON, Appellant. } No. 3670. Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of King county and upon the argument of counsel and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now on this 29th day of January, A. D. 1902, on motion of W. B. Stratton, Esquire, of counsel for respondent, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs, and that the said State of Washington have and recover of and from the said Anton Johanson the costs of this action taxed and allowed at thirty-eight & 50/100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

21 In the Supreme Court of the State of Washington.

THE STATE OF WASHINGTON, Plaintiff and Respondent,
vs.
ANTON JOHANSON, Defendant and Appellant. } Petition for the Allowance of Writ of Error.

To the Honorable James B. Reavis, chief justice of the supreme court of the State of Washington:

Now comes Anton Johanson, the above-named defendant and appellant in this court and petitions the honorable chief justice of this court for an allowance of a writ of error from the Supreme Court of the United States to this court to bring up for review by the Supreme Court of the United States, the judgment of this court in the above-entitled cause, rendered and entered herein under date of December the 19th, 1901; whereby this court adjudged and directed that the judgment of the superior court of King county in said cause must be affirmed and for an order fixing the amount of the security to be filed; that the plaintiff in error, said Anton Johanson, shall prosecute his said writ of error to effect and if he fail to make his plea good, shall answer all damages and costs and for the allowance of the citation to the adverse party upon the filing of such writ of error in this court and upon the approval and filing of such security in pursuance of the statute of the United States in such case made and approved.

This petition is based upon the fact that in this cause a title, right and privilege are claimed under the Constitution of the United States and the statutes thereof and under the authority exercised under the United States and the decision in said judgment of the supreme court of the State of Washington herein is against such title, right and privilege specially set up and claimed
22 by this petitioner under said Constitution and the statutes and authority exercised under the United States and your petitioner will ever pray, etc.

Dated this 13th day of January, 1902.

C. W. CORLISS,
Attorneys for Anton Johanson, Defendant and Appellant in this Court.
JNO. F. MAIN, *Of Counsel.*

Endorsement: No. 3670. Supreme court of the State of Washington. The State of Washington, *vs.* Anton Johanson. Petition for the allowance of writ of error. C. W. Corliss, attorney for defendant and appellant. Office address: 409 Burke bldg. Seattle, Washington. Service of the within paper on the undersigned, this 13th day of January, 1902, is hereby admitted. W. B. Stratton attorney general by C. C. Dalton ass't attorney general attorney for State of Washington. Filed Jan. 29 1902. C. S. Reinhart, clerk

23 In the Supreme Court of the State of Washington.

THE STATE OF WASHINGTON, Plaintiff and Respondent, *vs.* ANTON JOHANSON, Defendant and Appellant.	Assignment of Errors.

October term, in the year of our Lord one thousand nine hundred and two.

Afterwards, to wit: on the first Monday of October in this same term before the justices of the Supreme Court of the United States at the Capitol in the city of Washington, came the said Anton Johanson by C. W. Corliss, his attorney, and says:

1. That in the record and proceedings aforesaid there is manifest error in this, to wit: that — the declaration aforesaid, items therein contained are not sufficient in law in the said State of Washington to have maintained its aforesaid action thereof against the said Anton Johanson.

2. See next page.

3. There is also error in this, to wit: that by the record aforesaid it appears that the decree aforesaid — given for the said State of Washington, against the said Anton Johanson, whereas, by the law of the land, the said decree sought to have been given for the State of Washington against the said Anton Johanson, ought to have been

given for the said Anton Johanson, against the said State of Washington, and the said Anton Johanson prays that decree aforesaid may be reversed, annulled and altogether held for nothing and that he may be restored to all things which he has lost by action of the said decree.

24 There is manifest error in this, to wit:

That by said record and proceedings it appears that said judgment was given against the said Anton Johanson, plaintiff in error, and against the title, right, privilege and immunity specially set up and claimed by said plaintiff in error under the Constitution, statutes and authority of the United States.

C. W. CORLISS,
Attorney for Defendant and Appellant.
JNO. F. MAIN, *Of Counsel.*

Endorsement: No. 3670. Supreme court of the State of Washington. The State of Washington, *vs.* Anton Johanson. Assignment of errors. C. W. Corliss, attorney for defendant and appellant. Office address: 409 Burke bldg., Seattle, Washington. Service of the within paper on the undersigned, this 13th day of January, 1902, is hereby admitted. W. B. Stratton, attorney general, by C. C. Dalton, ass't att'y general attorney for State of Washington. Filed Jan. 29 1902 C. S. Reinhart, clerk.

25 In the Supreme Court of the State of Washington.

THE STATE OF WASHINGTON, Plaintiff and Respondent,
vs.
ANTON JOHANSON, Defendant and Appellant.
} Order Allowing Writ of Error.

This 17th day of January, A. D., 1902, came the defendant and appellant by his attorney and filed herein and presented to the court his petition praying for the allowance of the writ of error mentioned to be urged by him. Praying also that a transcript of the record and proceedings and papers upon which the decree herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof, the court does allow the writ of error upon the defendant and appellant, giving bond, according to the law, in the sum of five hundred dollars, which shall operate as a supersedeas bond.

Done at Olympia in the State of Washington, this 17th day of January, 1902.

JAMES B. REAVIS,
Chief Justice of the Supreme Court of the State of Washington.

26 STATE OF WASHINGTON, } ss:
County of Thurston, }

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that the above and foregoing is a true and correct copy of the order of the chief justice in the above-entitled cause.

Made and entered on this — day of January, 1902.

In witness whereof I have hereunto set my hand this — day of January, A. D., 1902, and affixed the seal of this court.

—— ——, *Clerk.*

Endorsement: No. 3670. Supreme court of the State of Washington. The State of Washington *vs.* Anton Johanson. Order allowing writ of error. C. W. Corliss, attorney for defendant and appellant. Office address: 409 Burke bldg., Seattle, Washington. Service of the within paper on the undersigned, this 13th day of January, 1902, is hereby admitted. W. B. Stratton attorney general by C. C. Dalton ass't att'y gen'l. Attorney for State of Washington. Filed Jan. 29 1902. C. S. Reinhart, clerk.

27 In the Supreme Court of the State of Washington.

THE STATE OF WASHINGTON, Plaintiff and Respondent,
vs.
ANTON JOHANSON, Defendant and Appellant.
} Bond for Writ of Error.

Know all men, that we, Anton Johanson, as principal and —— —— and United States Fidelity & Guaranty Co. as sureties, are held and firmly bound unto the plaintiff, State of Washington, in the full and just sum of five hundred dollars, to be paid to said plaintiff, State of Washington, its certain attorneys, executors, administrators, assigns, to which payment well and truly to be made we bind ourselves our heirs, executors, administrators, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25 day of January, in the year of our Lord, one thousand nine hundred and two.

Whereas, lately at a term of the supreme court of the State of Washington in a suit pending in said court, between The State of Washington, plaintiff and respondent, and Anton Johanson, defendant and appellant, a decree was rendered against the said Anton Johanson and the said Anton Johanson, having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the decree in the aforesaid suit and a citation directed to the said State of Washington, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be
28 held in the city of Washington, D. C., on the — day of —— next.

Now, the condition of the above obligation is such that if the said Anton Johanson shall prosecute said writ of error to effect

and answer all damages and costs if he failed to make this said plea good, then the above obligation to be void, else to remain in full force and virtue.

ANTON JOHANSON. [SEAL.]
[SEAL.] UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By H. CHENEY AND
JAMES B. MURPHY, [SEAL.]
Its Att'ys-in-fact.

Sealed and delivered in the presence of —
—— ——.

Witness to signature of Anton Johanson:
JNO. F. MAIN.

Approved by
REAVIS, *C. J.*

29 STATE OF WASHINGTON, } *ss:*
County of King, }

—— —— and —— ——, being duly sworn, each for himself deposes and says: I am one of the persons named in and who signed and sealed the foregoing supersedeas bond, as a surety. I am a resident of the State of Washington and not a counselor or attorney at law, sheriff, clerk of the supreme court of said State or other officer of said court, and I am worth the amount specified in the foregoing bond, to wit; the sum of — dollars over and above all just debts and liability and exclusive of property exempt from execution.

—— ——.
—— ——.

Subscribed and sworn to before me this — day of —— 1902.

——— ———,
Notary Public in and for the State of Washington, Residing at Seattle.

On reading and filing the foregoing bond and on motion of the above-named relator's attorneys, it is ordered that said bond as to both the form thereof and the sureties thereon be approved and the same is hereby approved as a supersedeas bond, upon the writ of error mentioned and that upon the filing of said bond, said writ of error operate as a supersedeas in the above-entitled action.

Done at Olympia, in the State of Washington, this — day of January, 1902.

——— ———,
Chief Justice of the Supreme Court of the State of Washington.

30 Endorsement: No. 3670. Supreme court State of Washington. The State of Washington *vs.* Anton Johanson. Bond for writ of error. C. W. Corliss, attorney for defendant and appellant. Office address: 409 Burke bldg. Seattle, Washington. Service

of the within paper on the undersigned, this ——, is hereby admitted. —— ——, attorney for —— ——. Filed Jan. 29 1902 C. S. Reinhart, clerk.

31 In the Supreme Court of the United States, —— Term, 1902.

ANTON JOHANSON, Plaintiff in Error,
vs.
THE STATE OF WASHINGTON, Defendant in Error. } Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable justices of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings as also *of* the rendition of a decree in a plea which is in the said supreme court of the State of Washington, before you or some of you, being the highest court of law or equity of the said State in which a decision came to be had in the said suit between *the* Anton Johanson, defendant and plaintiff in error and The State of Washington, plaintiff and defendant in error, wherein was drawn the question of the validity of a treaty or statute of the United States or right claimed under such treaty or statute and the decision was against their validity and against such right; a manifest error hath happened to a great damage of the said Anton Johanson, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf; do command you *that* decree be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the 31st day of March next in the said Supreme Court, to be then and there held—

32 That the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct this error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the — day of January, A. D. 1902.

Seal United States Circuit Court, District of Washington, Northern Division.

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the District of Washington,
By A. REEVES AYRES, *Deputy.*

Allowed by—
—— ——, *Justice.*

33 [Endorsed:] No. 3670. Supreme Court of the United States. Anton Johanson, *vs.* The State of Washington. Writ

of error. C. W. Corliss, attorney for plaintiff in error. Service of the within paper on the undersigned, this 13th day of January, 1902, is hereby admitted. W. B. Stratton, attorney general, by C. C. Dalton, ass't att'y general, attorney for State of Washington. Filed Jan. 29, 1902. C. S. Reinhart, clerk.

34 In the Supreme Court of the United States, October Term, 1902.

ANTON JOHANSON, Plaintiff in Error,
vs.
THE STATE OF WASHINGTON, Defendant in Error. } Citation.

The President of the United States of America *ss* State of Washington, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States in the city of Washington, D. C., on the 18th day of March next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Washington, wherein Anton Johanson is plaintiff in error and you are defendant in error, to show cause, if any there may be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of January, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America, one hundred and fourteenth.

JAMES B. REAVIS,
Chief Justice Supreme Court of Washington.

Attest:

[Seal of the Supreme Court, State of Washington.]

35 [Endorsed:] No. 3670. Supreme Court of the United States. Anton Johanson, *vs.* The State of Washington. Citation. C. W. Corliss, attorney for plaintiff in error. Office address: 409 Burke blg. Seattle, Washington. Service of the within paper on the undersigned, this 17th day of January, 1902, is hereby admitted. W. B. Stratton, attorney general by C. C. Dalton assistant att'y general attorney for State of Washington. Filed Feb. 3 1902. C. S. Reinhart, clerk.

36 In the Supreme Court of the State of Washington.

STATE OF WASHINGTON, Respondent,
v.
ANTON JOHANSON, Appellant. } No. 3670.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true and

correct transcript of the record in the above-entitled cause, and that, in pursuance of the writ of error heretofore filed in this cause, I herewith transmit to the Supreme Court of the United States the said transcript, together with the original writ of error and the original citation filed in this case.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Olympia, this 10th day of February, 1902.

[Seal of the Supreme Court, State of Washington]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 18,465 Washington supreme court. Term No. 282. Anton Johanson, plaintiff in error, *vs.* The State of Washington. Filed March 28th, 1902.

FILE COPY

Office Supreme Court U. S.
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MAR 11 1903
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

ANTON JOHANSON,
Plaintiff in Error,
vs.
THE STATE OF WASHINGTON,

No. 232.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR THE PLAINTIFF IN ERROR.

O. C. McGILVRA,
Attorney for Plaintiff in Error.

HENRY W. LUNG,
C. W. CORLISS and
JOHN F. MAIN,
Of Counsel.

The Metropolitan Press, Seattle.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

ANTON JOHANSON,
Plaintiff in Error.

vs.

THE STATE OF WASHINGTON,
Defendant in Error.

No. 282.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an action of ejectment begun by the defendant in error June 27, 1899, in the Superior Court of King County, State of Washington, alleging that it was seized

in fee and possessed and entitled to the possession of the north half of the southwest quarter, and the northwest quarter of the southeast quarter of section three, township twenty-five north, range four east of W. M., which land is of the value of twenty thousand dollars ($20,000); that on the 12th day of March, 1893, plaintiff in error ousted and ejected defendant in error therefrom and unlawfully retains possession thereof. (Record pages 1 and 2.)

Plaintiff in error by answer denies the allegations contained in the complaint of defendant in error (Record page 3.) The case comes on for trial and upon being heard, argued and submitted the trial court made and entered the following Findings of Fact and Conclusions of Law:

(Record, page 4.)

That the north half of the southwest quarter and the northwest quarter of the southeast quarter of section 3, township 25 north, range 4 east, is of the value of twenty thousand dollars and was selected by Phillip H. Lewis as agent for King County, Washington Territory, by filing a list of this and other lands designated as list No. 2 of indemnity school selection at the land office at Olympia, Washington Territory, May 24th, 1870, under an act of Congress approved March 2nd, 1853, and an act of Congress approved February 26th, 1859, which said selection was approved by Secretary C. Delano, January 27th, 1872.

2. March 13th, 1893, Anton Johanson made application to enter the land aforesaid under the homestead laws, and at that time made a settlement thereon; he has ever since lived on said land, his application was rejected by the local land office and subsequently appealed to the commissioner of the General Land Office, and finally to the Secretary of the Interior, who on December 18th, 1895, decided adversely to Anton Johanson.

From the foregoing facts the court finds as Conclusions of Law:

1. That the plaintiff was on the 13th day of March, 1893, seized in fee, and possessed and entitled to the possession to, said north half of the southwest quarter and the northwest quarter of the southeast quarter section 3, township 25 north, range 4 east.

2. That on the said 13th day of March, 1893, defendant unlawfully entered said premises and ejected the plaintiff therefrom, and unlawfully retains possession thereof.

To each of the foregoing Conclusions of Law defendant excepted, which exceptions were allowed.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that plaintiff have and recover of defendant the possession of the aforesaid premises, together with his costs, taxed at $————.

To each of the foregoing conclusions of law plaintiff in error excepted. (Record page 5.) From the final decree entered therein appeal was taken and presented by plaintiff in error to the Supreme Court of the State of Washington. (Record pages 5-7.)

On December 19, 1901, the State Supreme Court rendered its decision set forth in its opinion (Record pages 7 to 11) and on January 29th, 1902, entered its judgment. (Record page 12.)

The relator thereupon sued out a writ of error from this court. (Record pages 12 to 19.)

The decisions of the State Supreme Court were brought under review sustaining the judgment of the trial court in effect denies all the assignments of error presented to that court. Plaintiff in error conceives the questions arising in that case the same as those presented and distinctly contraverted in the trial court and the Supreme Court of the State of Washington.

This is an action wherein the facts of the case are not in controversy, it being the object of all the parties to this action to have the various facts bearing upon the title of the land in question construed by this court.

This court will find as all the courts before which this action has come, have found, *the plaintiff in error clothed with the possessory title of the land in question*, claiming

the same as his homestead under the Homestead Laws of the United States.

The defendant in error seeking to take from him his possessory title by setting up as a better title the fact that Phillip H. Lewis, as agent for King county, Washington Territory, filed a list of this and other lands designated as list No. 2 of indemnity school selections in the land office at Olympia, Washington Territory, May 24th, 1870, under an act of Congress approved March 2nd, 1853, and an act of Congress approved February 26th, 1859, which said selection was approved by Secretary C. Delano, January 27th, 1872, which title plaintiff in error denies, asserting:

1st. That Phillip H. Lewis had no authority to select indemnity school lands under the act of March 2nd, 1853, and the act of February 26th, 1859, or either of them.

2nd. That the Territory of Washington was not entitled to select indemnity lieu school lands under the act of February 26th, 1859.

3rd. That even though said selection was regularly and legally made it merely created reservation of the land in question and passed no title to the defendant in error.

4th. That by the act of February 27th, 1889 (the Enabling Act), Congress carved out of such reserved lands the portions it desired to grant to the State of Washington, granted them to the state, and expressly excepted from the operation of the grant the lands in question, putting an

end to the purposes for the reservation, and returning the lands in question to their original status, that of unappropriated government lands of the United States.

SPECIFICATIONS RELIED UPON.

1st. The State Supreme Court erred in deciding that Phillip H. Lewis had authority to act as agent for King County, or Washington Territory, in selecting and filing list No. 2 of indemnity school selections in the land office at Olympia, Washington Territory, May 24th, 1870, under an act of Congress approved March 2nd, 1853, and an act of Congress approved February 26th, 1859.

2nd. The State Supreme Court erred in deciding that the Territory of Washington was entitled to select lands in lieu of deficiencies arising from natural causes under the act of Congress approved February 26th, 1859.

3rd. The State Supreme Court erred in deciding that the State of Washington was on the 13th day of March, 1893, seized in fee, and possessed and entitled to the possession of the north half of the southwest quarter and the northwest quarter of the southeast quarter of section 3, township 25 north, range 4 east.

4th. The State Supreme Court erred in deciding that on said 13th day of March, 1893, plaintiff in error unlawfully entered the north half of the southwest quarter

and the northwest quarter of the southeast quarter of section 3, township 25 north, range 4 east.

ARGUMENT.

With reference to the first specification of error, Phillip H. Lewis assuming to act as agent for the county commissioners of King county, Washington Territory, selected the land in question under the acts of March 2, 1853, and February 26th, 1859, because parts of sections 16 and 36 of that township were fractional in quantity, a portion of each being occupied by Lake Washington. It is well settled "*that there can be no reservation of public lands except by some treaty, law or authorized act of the Executive Department.* (See *Woolsey vs. Chapman,* 101 U. S. 755; *U. S. vs. Fitzgerald,* 15 Peters, 407; also sections 2257 and 2258 R. S.) There is no act of Congress or of the Territory of Washington making Phillip H. Lewis agent or representative in any capacity of the United States government of the Territory of Washington, or even of King county, Washington. We therefore think it fair to assume that his act was unauthorized, hence the land in question could not by his act be legally reserved.

A consideration of the second specification of error requires somewhat of a review of the growth and policy of the government with reference to the reserving and granting of lands to the states for school purposes. The earlier colonial states had no grants for school purposes

at all. In later years Congress got to making definite grants to the states as they were taken into the Union. Finally it became the custom to grant to each state as it was admitted into the Union section 16 of each township for school purposes, and still later section 36 was included. Then finally, as the rights of settlers upon unsurveyed lands began to be recognized the government began to provide that where settlers in new territories located upon either sections 16 or 36 prior to survey, that the settlers might have the land so occupied, and selections of lieu lands might be made to take the place of such parts of sections 16 and 36 as should thus be taken up by settlers. The benevolence of Congress had grown to this point when the Territory of Washington was created and the act of Congress approved March 2, 1853, was passed. Act March 2, 1853 (10 Statutes, 179, Sec. 20, Sec. 1947, R. S.)

"Sections numbered sixteen and thirty-six in each township of Washington Territory shall be reserved for the purpose of being applied to common schools in that territory. In all cases where sections sixteen and thirty-six, or either or any of them, are occupied by actual settlers prior to the survey thereof, the County Commissioners of the counties in which such sections so occupied are situated, are authorized to locate other lands, to an equal amount, in sections or fractional sections, as the case may be, within their respective counties, in lieu of the sections so occupied."

This act contemplates that the county commissioners of each county shall act for someone in the matter of selecting these lieu lands. In as much as the Territory of Washington passed no acts with reference to the selection thereof and did nothing that recognized the county commissioners as its representatives for that purpose, and in as much as the reservation could only be made by the United States, we think the only logical conclusion that can be reached is that the act of 1853 made the county commissioners agents for the United States for the purpose of making the selections as specified in that act.

The act of 1853 was an act applicable to Washington Territory only. Three years later Congress extended to the balance of the states and territories where sections 16 and 36 had been granted or reserved for school purposes the same right; that of allowing settlers to settle upon sections 16 and 36 prior to their survey and acquire such lands, and allowing the selection of lieu lands to supply the deficiencies caused by such settlement. At this time Congress seems to have still been impelled by impulses of generosity and went a step further, allowing selections of lieu lands where sections 16 and 36 are fractional in quantity or where one or both are wanting by reason of the township being fractional or from any natural cause whatsoever.

Act of February 26, 1859 (11 Stat. 385).

An act to authorize settlers upon sixteen and thirty-six

sections, who settled before the surveys of the public lands, to present their settlements:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where settlements, with a view to pre-emption, have been made before the survey of the lands in the fields which shall be found to have been made on sections sixteen or thirty-six, said section shall be subject to the pre-emption claim of such settler; and if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors; and other lands are hereby also appropriated to compensate deficiencies for school purposes where said sections sixteen and thirty-six are fractional in quantity or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever; *provided*, that the lands by this section appropriated, shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of Congress of May twentieth, eighteen hundred and twenty-six, entitled, "An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for."

This act provides that the selections made under its terms shall be made in accordance with the principles of

adjustment and the provisions of the act of Congress of May 20th, 1826. Section 2 of the act of Congress approved May 20th, 1826, 4 Statutes, 179, is as follows:

Sec. 2. "And be it further enacted, that the aforesaid tracts of land shall be selected by the Secretary of the Treasury, out of any unappropriated public lands within the land district where the township for which any tract is selected, may be situated; and when so selected, shall be held by the same tenure, and upon the same terms for the support of schools in such township, as section number sixteen is, or may be held, in the state where such township shall be situated."

At the time of the passage of this act the Secretary of the Treasury had in his control the affairs of the public land system. Congress by this act recognizes the executive department as the proper officer to make the reservations of lands of this character; and, again, the act of 1859 recognizes the executive department as the proper officer to make the selection and emphasizes that recognition by taking it out of what would seem to be the natural department for the selection, that is, the Department of the Interior, and providing that the selection shall be made by the Secretary of the Treasury, the Interior Department having been created some ten years prior. (See act of March 3, 1849, 9 Statutes, page 395.)

The act of February 26th, 1859, as carried into the Revised Statutes, is silent upon the question of whom shall make the selection. (See sections 2275 and 2276 of the

Revised Statutes.) From the foregoing acts we can see no escape from the following conclusions:

1st. That when Congress passed the act of 1859 it intended any selections of lieu lands made thereunder should be made by an executive officer of the United States.

2nd. That it intended that such selection should be made by a particular executive officer, to-wit, that is: the Secretary of the Treasury.

3rd. Washington having been provided for by a special act of Congress, that of March 2, 1853, Congress did not intend that the act of 1859 should apply to her, hence there was no authority to make a selection under the act of February 26, 1859, of the land in question.

That act, or special law for Washington, was kept separate and carried into the Revised Statutes as section 1947, and so allowed to stand as a special law, applicable only to Washington Territory, at the same time the general act of February 26, 1859, and the act of May 20, 1826, were carried into the Revised Statutes as sections 2275 and 2276. These sections provided for all the other territories what the special act of March 2, 1853, had provided for Washington, except a difference in the provision of the two acts as to the mode and manner of the selection, and also that the act of February 26, 1859, went further and al-

lowed indemnity for the deficiencies arising from natural causes, and limited the amount that might be selected in a township of a certain size. It appears that the compilers of the Revised Statutes could not conclude that the act of February 26, 1859, embodied all the features of the act of March 2, 1853, which provided that the County Commissioners should make selections in lieu of such as were occupied within their respective counties, when the act of February 26, 1859, provided that lands should be selected by the Secretary of the Treasury, within the same land district, and in accordance with the following principles of adjustment, etc., limiting the amount that might be selected in a township, and therefore rightly concluded, in as much as repeals of statutes by implication are not favored, to carry it into the statute as a separate special statute (Section 1947, R. S.). See *Chew Heong vs. United States*, 112 U. S. 536. In the case of *State vs. Stoll*, 17 Wallace, 425, and *Ex parte Crow Dog*, 109, U. S. 556, the Supreme Court lays down this rule, that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is some necessary inconsistency in the two acts standing together. The reason assigned for this rule by Wood, V. C., in *Fitzgerald vs. Champenys*, (30 L. J. N. S. Eq. 782), and 2 *Johns* and *Hem.* 31-34.

"That the Legislature having had its attention directed to a special subject, and having observed all the circum-

stances of the case, and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

Which reason for the rule is a sound one. Of course, it would be impossible for the court to reconcile and construe the acts of March 2, 1853, and February 26, 1859, so as to make them both apply to the same state; for one provides that certain selections shall be made by the County Commissioners, while the other provides that the same selection, together with certain other selections, shall be made by the Secretary of the Treasury, and if we apply the rule laid down by the Supreme Court, to-wit: ,

"That a general act is not to be construed as a repeal of a previous act, unless there is some express reference to the previous legislation of the subject."

It will be impossible to arrive at any conclusion in the absence of further definite and positive legislation on the subject than that the act of March 2, 1853, would have to stand as a special act applicable only to Washington Territory, and any question that may have existed as to whether or not the act of February 26, 1859, repealed the act of March 2, 1853, seems to be settled beyond question. by the acts being carried into the Revised Statutes, as sections 1947, 2275 and 2276. (See section 5596, R. S.)

The third specification of error, to-wit: "That the State Supreme Court erred in deciding that the State of Wash-

ington was on the 13th day of March, 1893, seized in fee and possessed and entitled to the possession of the north half of the southwest quarter and the northwest quarter of the southeast quarter of section three, township twenty-five north, range four east," is the one most strongly relied upon by plaintiff in error. Assuming that the selection of the land in question was duly authorized and legally made, then the State's title consists of a selection made in territorial days under the act of Congress passed March 2nd, 1853. (10 Statutes, page 179, Sec. 1947 Revised Statutes; and the act of February 26, 1859; 11 Statutes, page 285; Sec. 2275 Revised Statutes.) All that the act of 1853 did with reference to sections 16 and 36 was to reserve them for the purpose of applying them to common schools. Lieu lands selected to supply deficiencies in these sections would, of course, be held for the same purpose and by no greater title. Therefore, up to the time of the passage of the Enabling Act we have the United States reserving sections 16 and 36 and the land in controversy, together with other lands, for the express purpose of granting the lands for common school purposes.

Hugh Barkley vs. The United States, 3 Wash. Ter. page 522.

Where the court in passing upon the question of whether the United States or the Territory of Washington had control over lands reserved under the act of March 2, 1853, says:

"The government has, for a wise purpose, set apart and reserved these lands from the general domain, and announced the purpose to which they will be devoted. It retains control and dominion over them until the happening of a certain event, it is somewhat as a trustee of an expressed trust. It also retains the right, up to a certain time, to annul the act by which such sections were reserved, and might, within that limit, annul the former act, and throw these lands open as public lands. *This reserved right in the Government must give it control over these lands as absolute as that of any owner could be.*"

United States vs. Elliott, 41 Pac. p. 720; 12 Utah, p. 119.

Where the Supreme Court of Utah in passing upon the same question, quotes the case above cited with approval and reversing its former decision, says:

"The truth is, a reservation can never be said, in the sense of law, to vest a title in the reservee, where there was formerly no right or title existing in such reservee. There is nowhere, in any of the statutes making such reservation, any intimation that the Congress of the United States intended that such reserved lands should pass out from under the dominion and control of the Government; and in the Enabling Act passed for the benefit of the people of this territory, Congress has granted such lands to the State to be formed out of the territory, thus clearly showing that at no time has Congress understood the mere reservation of the lands for school purposes to be equivalent to a conveyance of the same to the people of the territory."

When the State of Washington was admitted into the Union, Congress again showed that it understood these

lands to be in a mere state of reservation, for by section 10 of the act of February 22, 1889 (the Enabling Act), it remembered its promise to grant the state school lands, which grant it made in the following language:

"That upon the admission of each of said states into the Union, sections number 16 and 36 in every township of said proposed states, and where such sections, or any part thereof, have been sold or otherwise disposed of, by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivision of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior," etc., etc.

Congress took from this reservation of sections 16 and 36 and other lands, including the land in question, and made a grant to the state of sections 16 and 36 in terms that are plain and unmistakable, and in equally plain terms granted to the state lieu lands thereafter to be selected "in such manner as the legislature may provide, with the approval of the Secretary of the Interior."

It is to be noted at this point that the lieu land granted by the Enabling Act covers only a portion of the deficiency for which the selections were made under the acts of 1853 and 1859. In other words, the Enabling Act granted to the state lieu lands, "where such sections, or any part thereof, have been sold or otherwise disposed of by or

under the authority of any act of Congress," which would include lands settled upon prior to survey; but not lieu lands where sections 16 and 36 are fractional by reason of natural causes.

Congress plainly recognized there might be some uncertainty as to the disposition it intended to make of reserved lands (such as the land in question) which were not included in the grants contained in the Enabling Act. To make its intention plain it wound up the various grants in the following language, which forms a part of the last paragraph of section 17 of the Enabling Act:

"That the states provided for in this act shall not be entitled to any further or other grants of land, for any purpose than as expressly provided in this act."

This language is so clear and expressive as to leave no room for argument as to its meaning. It cannot even be argued that it does not apply to all the grants, for the sentence refers to the "Act," and "further and other grants," and to make it still plainer, the next sentence, which forms the balance of the paragraph, expressly refers to the section of which it is a part.

Congress, by the Enabling Act, not only took from this reservation of school lands a portion of the reserved land and granted it to the state, and said the state should not have any more lands for that purpose, but it repealed the acts of 1853 and 1859. Section 25 of the Enabling Act

provides, "that all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said territories, or by Congress, are hereby repealed."

The last part of section 11, of the Enabling Act, which refers to school lands, provides:

"And such lands shall not be subject to pre-emption, homestead entry or any other entry under the land laws of the United States, whether surveyed or *unsurveyed;* but shall be reserved for school purposes only."

While both the acts of 1853 and 1859 provide that settlements may be made upon sections 16 and 36 prior to survey thereof, and the entry perfected.

Again, the act of 1853 made no reservation of mineral lands, while the Enabling Act reserved mineral lands. With such direct conflict the acts of 1853 and 1859 cannot stand.

The State of Washington has recognized its right to lieu lands under the terms of section 10 of the Enabling Act.

See laws of Washington for 1889 and 1890, p. 286.
See laws of Washington for 1891, page 399.

For the interpretation of Congress for a similar act, see acts with reference to State University Lands.

Act of July 17, 1854. (10 U. S. St. at Large, 305.)

Act of March 14, 1864. (13 U. S. St. at Large, 28.)

See also section 14, act of February 22, 1889 (Enabling Act), where Congress provides that the land confirmed in the grantees of the territory shall be included in making up the state's quota for university purposes.

It is a significant fact that there were never any acts of the legislature of the Territory of Washington with reference to these lands showing that the territory appreciated the fact that it had nothing to do with the lands, no interest or title in them, until after the passage of the Enabling Act. They had been taught the effect of these acts and the status of these lands by their experience with state university lands which were held in a state of reservation under a similar act where the territory authorities attempted to make use of what they conceived to be their title to the lands.

An examination of the acts and decisions bearing upon the university lands of Washington will show plainly that the courts and Congress itself has placed a construction upon land grants almost identically the same as the school land grants, which is the same as plaintiff in error now seeks to have placed upon the grants applicable to the land in question. The university lands of Washington were selected under section 4 of the act of Congress approved July 17, 1854. (See 10 St. at Large, 305.)

"Sec. 4. And be it further enacted that in lieu of the two townships of land granted to the Territory of Oregon by the 10th section of the act of 1850, for universities, there shall be reserved to each of the territories of Washington and Oregon two townships of land of 36 sections each, to be selected in subdivisions, for university purposes, under the direction of the legislature of said territories, respectively."

Under the foregoing act the Board of Commissioners selected the university lands for the territory of Washington, and thereafter undertook to sell and convey the same, executing deeds therefor. When it came to be recognized that the act of September 27th, 1854, authorizing the selection of the university lands, merely reserved them for the purpose of granting at some subsequent date, and that the Territory of Washington in fact had no title to the lands which it could convey. Congress passed the act of March 14, 1864 (13 St. at Large, page 28), wherein, after reciting the previous act, Congress says:

"Whereas, it has been represented that sales have been made by territorial authorities of lands selected by virtue of the terms of said act of the 17th of July, 1854, authorizing selections to be *reserved* merely, under the conviction that they had power to dispose of the same as a fee simple grant; therefore,

"Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That in all cases of sales made to individuals by the territorial authorities prior to the passage of this act, in which it may be shown to the satisfaction of the Secretary of the Interior that such sales were bona fide and of the class

hereinbefore mentioned, and that the tracts so held are selections in all other respects regular and proper, it shall and may be lawful for the secretary to approve such selections as a grant in fee simple, and a transcript certified under the seal of the general land office by the commissioner thereof of such approval shall vest the title in the territory and its bona fide vendees."

This act clearly shows that Congress intended no title to pass to the Territory of Washington where it directed the selection of the land for the purpose of reserving them either for school or university uses. Following this, in the year of 1875, the legislature of the Territory of Washington passed an act, approved October 26, 1875, page 103 of the laws of Washington Territory of 1875, reciting substantially all that had occurred declaring by its enactment that all such deeds were valid and carried to the respective purchasers, "their heirs, executors and assigns all the right, title and interest therein vested or which may thereafter be vested in the Territory of Washington to the lands described in said deeds."

For a full discussion of the acts with reference to these university lands see *Keane vs. Braygger*, 28 Pacific, 653; 3 Wash. State, 338.

The act of February 22, 1889, gave the state the right to make indemnity selections subject to the approval of the Secretary of the Interior, and no reference is made to the selections that include the lands in question, which were made in territorial days, other than the general one where-

in Congress asserted that the state should have no other or further lands for that purpose except as in that act provided. The same act also goes further and provides that the state shall waive any right it may have to all land not appropriated.

See section 4 of the act of February 22, 1889, wherein Congress provides that as a condition of admission into the Union the constitutional convention should provide "by ordinance, irrevokable without the consent of the United States and the people of said states," etc., etc.

2nd. That the people inhabiting said proposed states to acknowledge and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof."

The first legislature of the state recognized the binding effect of this compact and the repealing effect of the act of 1889 when it enacted section 3 of "An act to provide for the selection of indemnity lands for the support of common schools in lieu of sections 16 and 36, or any parts thereof, that have been sold or otherwise disposed of by or under the authority of any act of Congress and declaring an emergency;" approved March 26, 1890, as follows:

"Sec. 3. With the least practicable delay after organization the Board of Commissioners herein provided for shall proceed to segregate lands for the support of common schools, in lieu of sections 16 and 36, or any parts thereof, of every township of the state that have been sold

or otherwise disposed of by or under the authority of any act of Congress, and when such segregation is completed the Board of Commissioners shall report the fact to the Secretary of the Interior and request his approval of the selections made; *Provided,* That the selections shall be made in conformity with the provisions of sections ten and nineteen of the act of Congress enabling the states of North and South Dakota, Montana and Washington to be admitted into the Union."

This act is a plain admission by the state that it had no claim to indemnity for losses occurring in sections 16 and 36 from natural causes; and an equally plain admission that it had no claim to the indemnity lands located by the county commissioners.

The deficient section as indemnity for which this tract was located has been granted to the state. The indemnity selection was either granted at the same time, or was released from reserve. There is no provision of law for continuing the indemnity reserve after the deficient section was granted, the reserve being made "in contemplation of a future grant." Congress may have intended to permit the county commissioners to set apart this tract to fill out the amount of reserved acreage in the deficient reserved section, but both the deficient section and the indemnity remained within the control and "powers of disposition of Congress" until the land was actually granted, and if the deficient section was granted and nothing said about this tract set apart as indemnity by the

county commissioners, this tract was not granted, and not reserved for any future grant.

In the case of *Clements vs. Warner,* 24 How. 394, the Supreme Court said:

"The policy of the federal government in favor of settlers has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

In *Shepley vs. Cowan,* 91 U. S. 330, the court said:

"The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The reservation was asserted, as already mentioned, on the ground that the land was then claimed as a part of the Commons of Carondelet."

In *Aurrecoechea vs. Bangs,* 114 U. S. 381, the court said:

"In the case before us the pre-emptor was the first, after the land ceased to be a part of the Mexican claim and was restored to the public domain, to make application to the land office and assert his right to appropriate it as public land. The officers of the department recognized his claim, as we think they were bound to do, for the land had only a few days before this become public land, and thus liable to pre-emption or the valid selection of the state. The invalid selection, made at a time when the land was not subject to a selection, was not made good by the act of 1866, which expressly excluded it; and while we held that after the land became public land and liable to

selection, the former selection might be held good, its *validity* could not relate to the time of its assertion in the land office after it became so liable. But if, before the latter proceeding was had, *or notice to the land office of an intention to rely on the old section was given,* other rights had intervened, the state right of selection could not be made to the prejudice of those of others."

Another point to which we desire to direct the court's attention is that the special act of March 2, 1853, reserving school lands for Washington Territory provided for the selection of lieu lands where any part of sections 16 or 36 were lost by reason of settlement thereon prior to survey. The act of February 26, 1859, carried to all the other states and territories the right to select lieu lands to supply deficiencies arising in sections 16 and 36 by reason of settlement thereon prior to survey; also the right to select in lieu of deficiencies arising from natural causes, such as sections 16 or 36 being under water.

The act of February 22, 1889, carried to the State of Washington the right to select in lieu of any deficiencies arising in sections 16 or 36 "where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress." This right to indemnity or lieu lands as carried to the state by the Enabling Act (of February 22, 1889) would include any lands lost by settlement upon sections 16 and 36 as provided in both the acts of 1853 and 1859, but it does not carry to the state the right to lieu lands by reason of

sections 16 or 36 being fractional in quantity, or "where either one or both are wanting by reason of the township being fractional, or from any natural cause whatever."

Assuming that the act of 1859 applied to the State of Washington, then we contend that Congress wisely receded from its expressed intention of giving the state lieu school lands, because of fractional townships, as there are many fractional townships, especially in the vicinity of the Puget Sound country, where the fraction of the township remaining amounts to little if any more than two sections, and had Congress applied any such rule of donating its lands to the state for school purposes, there might have been townships where all or nearly all of the land in the township might have been applied to that purpose. It cannot be urged that there was ever a grant of lands to the State of Washington for school purposes until the passage of the act of February 22, 1889. Therefore, in order for the state to acquire a valid title to lieu or indemnity school lands, it must comply substantially with the terms of that act. The act itself provides that the land shall be selected "in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken are hereby granted to said states for the support of common schools; *such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior.* Again, such lieu lands

must be taken only "where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress." The defendant in error does not claim the land in question was ever selected in the manner provided by the legislature of the State of Washington or that any such selection ever had the approval of the Secretary of the Interior, nor can it claim that the land in question was selected in lieu of the loss of any part of sections 16 or 36 by or under the authority of any act of Congress.

With reference to the fourth specification of error, it is practically disposed of by the court's ruling upon the third, as the land either belongs to the State of Washington or is public land of the United States subject to the homestead entry of plaintiff in error, there being no question as to his homestead right, or his compliance so far as he has been permitted to, with the homestead laws.

The defendant in error having failed to show any title to the land in question, its action must fail and the decree of the Supreme Court of the State of Washington should be reversed, with instructions to enter a decree in favor of plaintiff in error.

O. C. McGILVRA,
Attorney for Plaintiff in Error.

HENRY W. LUNG,
C. W. CORLISS and
JOHN F. MAIN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

ANTON JOHANSON,
Plaintiff in Error.

vs.

THE STATE OF WASHINGTON,
Defendant in Error.

No. 282.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF FOR THE PLAINTIFF IN ERROR.

Defendant in error makes four points in its brief which might be considered by the Court as material, all of which can be successfully answered. They are:

1st. The question of whether or not the land in controversy was selected because of Sections 16 and 36 being fractional in quantity; that is, deficient because of a part of the sections being under water.

2nd. The question of Phillip H. Lewis' authority to make any selection under the act of February 26, 1859.

3d. The effect of the selection and approval by Secretary Smith made May 24th, 1895.

4th. The effect of the act of December 20th, 1892.

First. With reference to the first question we contend that the natural inference to be drawn from the stipulated fact that Lewis selected under both the acts of March 2, 1853, and February 26, 1859, is that he was selecting lands in lieu of deficiencies arising from natural causes. There could have been no other reason for his assuming to act under the authority of the act of 1859.

But we are not compelled to resort to inference with reference to this question for in the case of Sharpstein vs. State of Washington, 13 Land Decisions, 378, cited by defendant in error on page 6, of his brief, the Secretary of the Interior in his decision with reference to a piece of land lying in the same township in which the land in this controversy lies and involving the same selection, said:

"Township 25 North, Range 4 East, is covered in part by Lake Washington, Union Lake, Green Lake and Elliott Bay. The public survey approved in 1863 shows the township to contain 13,504.32 acres. Sections 16 and 36 of that township have respectively 341.76 acres and 83.25 acres section in place, making a total of 425.01 acres."

Again, in the same decision he said: "As to the right of Washington Territory to select under the act of 1859, but little need be said. The act of 1859 is a general provision applicable alike to all the states and territories and

the Department has universally so held, as far as I am advised, authority was therein conferred for the selection of indemnity land to cover deficiencies caused by fractional school sections.

Second. In reply to the second question, that is, of Phillip H. Lewis' authority to make the selection under the act of 1859, instead of the Secretary of the Treasury, defendant in error points to the fact that the act of March 2, 1849, transferred the duties of the Secretary of the Treasury to the Secretary of the Interior with reference to all land matters.

This transfer of authority from the Secretary of the Treasury to the Secretary of the Interior was ten years prior to the act of February 26, 1859, Is it not to be presumed that in passing the act of February 26, 1859, ten years later, when Congress was dealing with the subject, they were aware of the duties of the two officers, and does not their act at this later date designating the Secretary of the Treasury as the particular officer to make selection emphasize the fact that Congress wanted the Secretary of the Treasury to make this selection and not the Secretary of the Interior? May Congress not have had in mind the fact that it would become the duty of the Secretary of the Interior to approve the selection and have named the Secretary of the Treasury as the particular officer to make this selection in order that the selection might not be in the ridiculous position by having to be approved by the same person who made it?

Third. As to the effect of the new selection made by the State of Washington and the approval of that selection made by Secretary of the Interior Hoke Smith, May 24th, 1895, and set forth in full on pages 7 and 8 in the brief for defendant in error:

There seems to be no room to doubt that this is a new selection. It is clearly shown by the Commissioner's letter accompanying the list to Secretary Smith for his approval also quoted in full in the brief for defendant in error on page 7, where the Commissioner describes the lands as those "selected in the Seattle Land District, State of Washington, *by a duly authorized agent of said state.*" He also refers to the list as "List No. 1," whereas the list under which the land in controversy was originally selected was list "No. 2." (See Brief of Defendant in Error, page 7; also findings in transcript of record, page 4.)

There never was an authorized agent of the State of Washington until after the passage of the act of March 26, 1890, by the Legislature of the State of Washington found in the Laws of Washington for 1890, page 286, hence a selection by an authorized agent of the State of Washington could not have been made prior to March 26th, 1890.

Again, the list of selections made by Phillip H. Lewis, May 24th, 1870, embracing the lands in question, was filed in the Land Office at Olympia, Washington, there

being at that time no Seattle Land Office. (See Transcript of Record, page 4.)

The fact that Secretary Smith found it necessary to approve the selection shows it to be a new selection because the list No. 2, of May 24th, 1870, was approved by Secretary C. Delano, January 27, 1872. (See Transcript of Record, page 4.)

The approval of Secretary Smith made May 24th, 1895, was in the exact language used by Secretary Delano, May 24th 1870, and it is not fair to presume that Secretary Smith was doing a useless act.

The State in order to have made a new selection and avail itself of the new acts in its behalf, namely, the acts of February 22, 1889, and February 28, 1891, by a new selection, must have waived all its rights under the old selection and taken the land subject to the rights of this appellant who was occupying the land and insisting upon his right to the land under his homestead entry.

Secretary Smith recognized that this question existed and justly reserved the rights of this claimant in his approval quoted in full on page 8 of brief of defendant in error, by the use of the following language:

"is hereby approved subject to any valid interferring rights which may have existed at the date of selection."

The relative rights of the settler and the State in a case exactly parallel with this, was squarely passed upon

in Barkley vs. The State of California, 6 Land Decisions, page 699, where the Secretary of the Interior held:

"That a selection upon a basis defective in part is valid as a whole;" also, "A defective selection cannot be cured by a relinquishment and amended so as to defeat the rights of claims initiated prior to amendment."

This is a case where the State of California in making a selection of 320 acres of lieu school land under the act of 1859, used as a basis for that selection 43.66 acres that had been used as a basis for a previous selection. After the selection had been made Barkley made application to purchase under the timber act of June 3rd, 1878. The local office rejected his application upon the grounds that the lands were lieu school lands. Thereafter the Commissioner of the General Land office reversed the decision of the local office upon the ground that the selection was void, having been in part made upon a basis that had been previously used. The State of California then relinquished its previous selection where the 43.66 acres had been used in order to cure its selection of the 320 acres, and this the Secretary of the Interior justly held could not be construed to cure the selection as of the date it was originally made so as to defeat the claim of the entryman.

Fourth. With reference to the fourth question, that is, the effect of the act of December 20, 1902. This act seems to be an unjust attempt upon the part of the State to take from appellant in error his rights. There is also another aspect of the affair. It is a confession that the

claims of appellant are well founded. The act as passed is not as quoted in the brief of defendant in error on page 17. He has quoted the bill as originally introduced. Senator Foster and Congressman Jones of the State of Washington, who procured the passage of this act became aware of the claims of this and other litigants for these lands after this bill had been introduced and had passed the Senate, and they procured an amendment to the bill for the purpose of protecting the rights of these litigants, and that amendment consisted of striking out Paragraph I of said act the following language:

"And said lands so selected and located are hereby granted to said State of Washington."

And from Paragraph II the following language:

"And said lands so selected and appropriated are hereby granted to said state."

which makes the act as passed read as folloys:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in all cases where sections sixteen and thirty-six or either or any of them or any portion thereof have been occupied by actural settlers prior to survey thereof, and the county commissioners of the counties in which said sections so occupied as aforesaid are situated, have, under this act of Congress of March second, eighteen hundred and fifty-three, located or selected other lands in sections or fractional sections, as the case may be, within

their respective counties in lieu of said sections so occupied as aforesaid, the lands so located or selected, when the same have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State by said act of February twenty-second, eighteen hundred and eighty-nine, and the title of said State thereto is hereby confirmed.

"Sec. 2. That where any lands appropriated by Congress to said Territory to compensate deficiencies for school purposes where sections sixteen and thirty-six were fractional in quantity, or where one or both were wanting by reason of the township being fractional, or from any natural cause, whatever, or where section sixteen or thirty-six were patented by pre-emptors, have been selected and appropriated as provided in said act of Congress of February twenty-sixth, eighteen hundred and fifty-nine, the lands so selected and appropriated, when the same have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State of Washington, by the said act of February twenty-second, eighteen hundred and eighty-nine, and the title thereto confirmed.

That leaves this act a mere confirmatory act, if it is anything at all. A confirmation is defined by Black to be: "A contract by which that which was infirm, imperfect or subject to be avoided is made firm and unavoidable.

"A conveyance of estate or rights in esse whereby a

voidable estate is made sure and unavoidable or whereby a particular estate is increased."

Appellant contends that in order to pass any estate by a confirmatory act there must at the time of the passage of the act be what would amount to at least a voidable estate and if this Court should find as we respectfully think they must find that the act of February 22, 1889, was a clear and distinct declaration upon the part of Congress at that time that the State of Washington should not have these particular lands, then there was no estate to be confirmed and this act could have no effect as far as the land in controversy is concerned.

Again, even granting that there was an estate there to be confirmed and that the act of December 20th, 1902, is a confirmatory act, then it can only be urged that the titles which were certified or had attempted to be certified to the State were confirmed and all of those attempts must justly preserve the rights of adverse claimants. The language of Secretary Hoke Smith cited and quoted by defendant in error is as follows:

"Department of the Interior, Office of the Secretary.
"Washington, D. C., May 24, 1895.

"The foregoing list of State of Washington school land indemnity selections (No. 1), embracing fifteen thousand four hundred and seventy-one acres and thirty-seven hundredths of an acre (15,471.37), *is hereby approved*

subject to any valid interfering rights which may have existed at the date of selection.

"HOKE SMITH, Secretary."

Secretary Delano's approval is as follows:

"Department of the Interior, Office of the Secretary.
"Washington, D. C., January 27, 1872.

"The foregoing list of school indemnity selections for the Territory of Washington, (No. 2) is hereby approved, subject to any valid interfering rights which may have existed at the date of selection.

"C. DELANO, Secretary."

Hence, this act even if it is held to be a confirmatory act, can only be held to be an act confirming the title to those lands to which there was no claim.

There is grave question as to whether or not this act even amounts to a confirmatory act. The act says, after referring to the lands, that they "shall be deemed and taken to have been granted to said state by the act of February 22, 1889."

This amounts to an amendment to the act of February 22, 1889, with an assertion that it shall be imagined that the Congress of 1889 passed such amendment or intended to. We are not contending that the Congress of 1902 could not pass retrospective laws but can they establish that a former Congress passed an act which that former

Congress clearly did not pass. Some line is drawn upon what Congress by its act of December 20, 1902, was attempting to do by a reference to the committee reports of both the House and Senate Committees. Those reports each contained the following language:

"A similar holding has been made by the Supreme Court of the State of Washington, but as the matter has been questioned in several instances as above stated, it is desirable that a legislative construction of the acts referred to should be had and this is the only purpose of this bill."

This language shows that Congress was not attempting to pass a new act but rather attempting to interpret the acts of previous sessions. Was it not invading the jurisdiction of the courts?

In conclusion defendant in error by his last paragraph of page 22 of brief, attempts to appeal to the Court by reason of some imaginary equity that the state may have. He assumes facts which are not true, because the State has so little or none of this class of lands and it has not attempted to convey the land in question, otherwise it would have had no right to institute this action. The equities in this case lie on the side of the settler who has spent ten long years hewing himself a home out of the timber and if this Court decides adversely to him he must lose his home and his ten years' toil, whereas, if the decision is adverse to the State it loses nothing because it has the right to

select all the lands that have ever been given to it and we must respectfully submit that if equities are to control in this case then the decision of the Supreme Court of the State of Washington must be reversed.

Respectfully submitted,

C. W. CORLISS,

Attorney for Plaintiff in Error.

FILE COPY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
MAR 30 1903
JAMES H. McKENNEY,
Clerk.

ANTON JOHANSON,
Plaintiff in Error.

vs. No. 282.

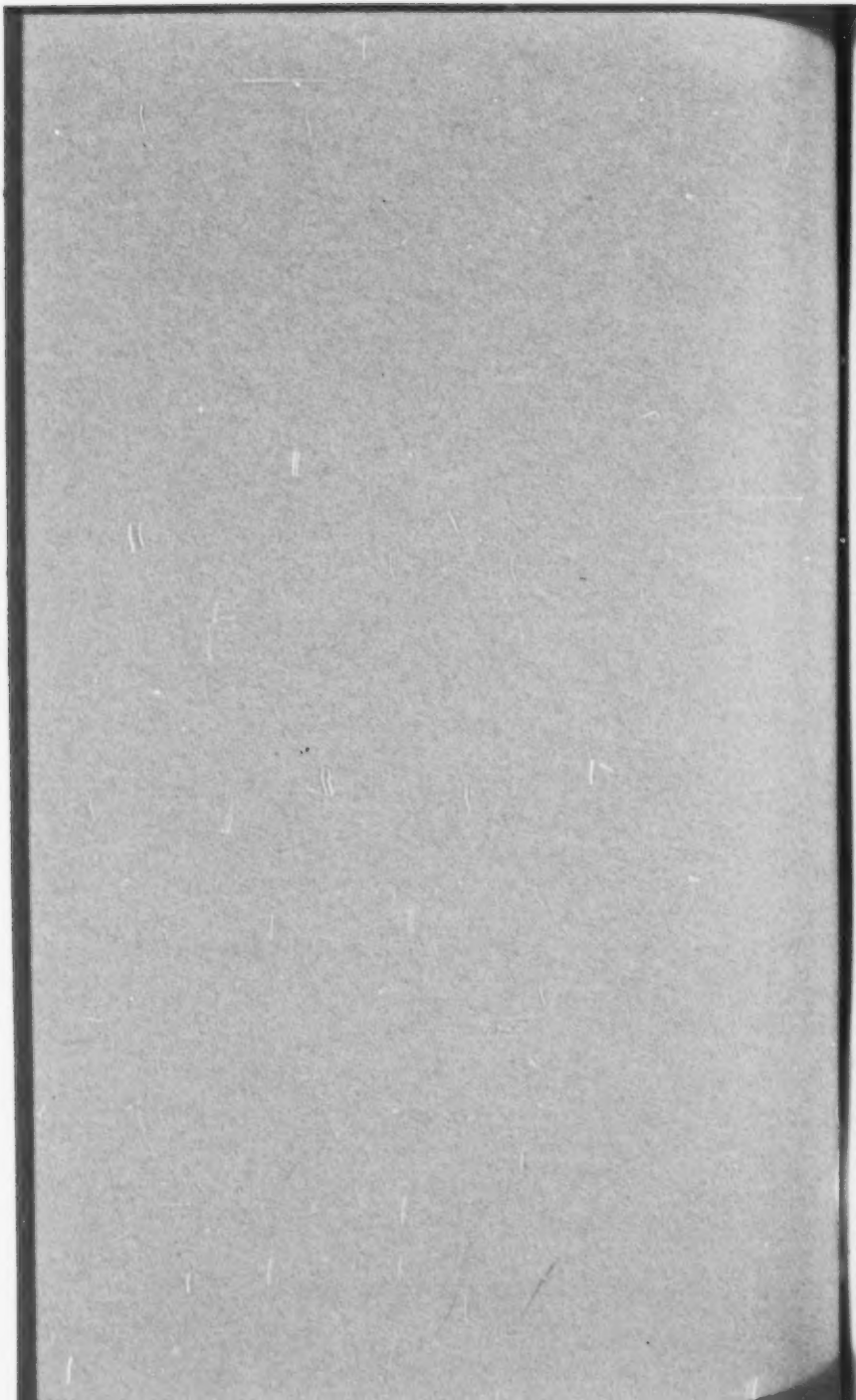
THE STATE OF WASHINGTON,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR THE DEFENDANT IN ERROR.

W. B. STRATTON, Attorney General,
Attorney and Counsel for Defendant in Error.

The Metropolitan Press, Seattle.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

ANTON JOHANSON,
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THE STATE OF WASHINGTON,
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BRIEF FOR THE DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

The first specification of error relied on by plaintiff in error (page 6 of his brief) to the effect that the state

supreme court erred in deciding that Phillip H. Lewis had authority to act as agent for King County in making the selection, is raised for the first time in this court. That this question was not suggested in either state courts is shown by the following statements of the plaintiff in error in his brief in the supreme court, towit:

"The first error was in holding the respondent had title to the land in controversy, and presents practically the only question in this case.

"The State's title consists of a selection made in Territorial days, under the Act of Congress passed March 2nd, 1853, (10 Stat. p. 179, Sec. 1947 R. S.), and the Act of February 26th, 1859 (11 Stat. p. 385, Sec. 2275 R. S.).

"Appellant contends that all the selection did was to set the land in question aside, or create a reservation of it for the purpose of granting it to the State, afterwards to be erected out of the Territory."

That the question of lack of authority of the agent was not intended to be raised but that Lewis' authority was conceded on all hands, is also shown by the very opening statement in the brief of respondent in the state supreme court, towit: "It is conceded that the land in controversy was selected by the county commissioners of King County *through a properly authorized agent.*" This statement was unchallenged in the reply brief of plaintiff in error. In fact it is expressly stated and found in the opinion of the state supreme court (p. 10, Transcript of

Record), that the land in controversy was duly selected by the county commissioners. This is the language used:

"Certain of these settlements were found to fall within sections 16 and 36, and the Government, *recognizing the settler's prior rights, patented the land to the settler.* In lieu of certain lands occupied and lost to the use of the common schools *in this way*, the *board of county commissioners, pursuant to authority expressly granted them by Congress, selected the lands in controversy.* This selection was, pursuant to the same authority, approved by the Secretary of the Interior."

To review the decision of the state court upon a question of fact is not within the jurisdiction of this court.

Dower v. Richards, 151 U. S. 658;
Bartlett v. Lockwood, 160 U. S. 357;
Egan v. Hart, 165 U. S. 188;
Hedrick v. Atchison &c., 167 U. S. 673.

A writ of error brings up matters of law only.

Dower v. Richards, supra.

In fact the first paragraph of the stipulated facts upon which the case was tried, shows that it was an admitted fact that the land in controversy was selected in full compliance with the acts of Congress of March 2, 1853, and February 26, 1859. (10 Stat. 179, Sec. 20, Sec. 1947 R. S. U. S.; 11 Stat. 385).

This stipulated fact is as follows:

"That the North half of the Southwest quarter, and the Northwest quarter of the Southeast quarter of Section 3, Township 25 North, Range 4 East, is of the value of $20,000, and was selected by Philip H. Lewis as agent for King County, Washington Territory, by filing a list of this and other lands designated as list No. 2 of indemnity school selection, at the Land Office at Olympia, Washington Territory, May 24th, 1870, under an Act of Congress approved March 2nd, 1853, and an Act of Congress approved February 26th, 1859, which said selection was approved by Secretary C. Delano, January 27th, 1872."

This stipulation just quoted shows that the selection made by Lewis "As agent for King County, Washington Territory," was approved by Secretary of Interior C. Delano, January 27, 1872. Such approval operated as a selection made by the executive department of the United States and therefore falls within the cases cited on page 7 of brief of plaintiff in error under the consideration of first specification of error. Such approval also operated as a selection by the proper executive department of the federal government under the act of February 26, 1859.

Todd v. Washington, 24 Land Decisions, 106;
Case of John W. Bailey, et al., 5 Land Dec. 216.

The second paragraph of the stipulated facts (Transcript of Record, p. 5) is as follows:

"March 13th, 1893, Anton Johanson made application to enter the land aforesaid under the homestead laws, and at that time made a settlement thereon; he has ever since lived on said land, his application was rejected by the local land office and subsequently appealed to the Commissioner of the General Land Office, and finally to the Secretary of the Interior who on December 18th, 1895, decided adversely to Anton Johanson."

When the Secretary of the Interior, on December 18, 1895, decided adversely to Anton Johanson, he necessarily found and decided as a fact in the case that Lewis was the authorized agent for the purpose of making the selection. That being the case, under the rule announced by this court in the case of *Moore v. Robbins*, at page 535, of Vol. 96, United States Reports, "That the decision of the officers of the land department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question," the authority of the agent cannot here be drawn in question.

This rule is of universal application and a further citation of authorities is unnecessary. The case of *Keene v. Brygger*, 3 Wash. at p. 348 et seq., reviews the authorities.

In the case of *Sharpstein v. State of Washington*, 13 Land Dec. 378, it was said:

"It appears that the county commissioners of King County, on February 8, 1870, appointed P. H. Lewis to select school indemnity land for the county. On May 24, of that year the agent filed in the local office list No. 2, embracing selections to compensate for deficiencies in nine townships, by reason of portions of sections 16 and 36 being under water."

It will thus appear that the department has found that Lewis was the duly authorized agent to make the selection in question (by said "list No. 2") and it has many times been decided by the Secretary of the Interior that the county commissioners might lawfully delegate that authority to an agent.

But this question of authority of agent not having been raised in the state court cannot be presented here for the first time.

Not only did the Secretary of the Interior in 1872 approve the selection made by King County through its agent Lewis as shown by the stipulation, but in the year 1895 the Secretary of the Interior also approved the same selection. This approval of 1895 related back to the time of the selection.

Keene v. Brygger, 3 Wash. 338, at p. 350.

April 23, 1895, the commissioner of the general land

office made the following certificate respecting the lands in controversy:

"Department of the Interior, General Land Office,
Washington, D. C., April 23, 1895.

"It is hereby certified that the tracts described in the foregoing list of school land indemnity selections are embraced in the original lists on file in the office of lands selected in the Seattle land district, State of Washington, *by a duly authorized agent of said State,* as indemnity for deficiencies in the sections and townships named, which school land indemnity selections are authorized by the acts of Congress approved March 2, 1853 (10 U. S. Stat., 172), February 26, 1859 (11 U. S. Stat., 385), and Sections 2275 and 2276 of the U. S. Revised Statutes.

"It is further certified that the lands reported lost or deficient and those selected in lieu thereof have been examined and compared with the township plats and tract books in this office; that the indemnity lands claimed have been found to be properly due the townships for which selected, and that the selected lands are shown to have been subject to selection; being surveyed agricultural lands, non-mineral in character and free from adverse claims.

"It is therefore recommended that the said list, embracing fifteen thousand four hundred and seventy-one acres and thirty-seven hundredths of an acre (15,471.37), be approved, subject to any valid interfering rights which may have existed at the date of selection.

"S. W. LAMOREUX,
"Commissioner."

And on May 24, 1895, Hoke Smith, the Secretary of the Interior, made the following approval:

"Department of the Interior, Office of the Secretary,
"Washington, D. C., May 24, 1895.

"The foregoing list of State of Washington school-land indemnity selections (No. 1), embracing fifteen thousand four hundred and seventy-one acres and thirty-seven hundredths of an acre (15,471.37) is hereby approved subject to any valid interfering rights which may have existed at the date of selection.

"HOKE SMITH, Secretary."

The certificate and approval just quoted attached to a description of the lands selected in list No. 2 by Mr. Lewis acting as agent, and of the lieu lands in question, are on file in the office of the land commissioner of the State of Washington, having been sent to that office by the Secretary of the Interior. It will be seen that very nearly six years after the Enabling Act had been passed the federal land department and the secretary thereof found that all the facts existed which were necessary to give to the state a title to this land in controversy. It is hardly possible that this title can be seriously questioned.

The acts of 1853 and 1859 have been construed by those whom the law specially appointed to construe and execute them. First, by Secretary Delano in 1872, and second, by Secretary Hoke Smith in 1895, "and it is a principle well recognized by the courts that the construction given to statutes by those charged with the duty of executing them should not be overruled without cogent reasons."

Keene v. Brygger, supra.

If a statute is ambiguous, contemporaneous and uniform executive construction is regarded as decisive.

Brown v. United States, 113 U. S. 568;
Edward's Lessee v. Darby, 12 Wheat., 210;
United States v. State Bank of N. C., 6 Peters, 29;
McSorley v. Hill, 2 Wash., 638.

Both approvals of the selection show that the secretaries construed both the act of 1853 and that of 1859 to be in force, and applicable to Washington Territory.

By the act of March 2, 1849, 9 Stat., p. 395, selections to be made by the Secretary of the Treasury under act of Congress approved May 20, 1826, 4 Stat., 179, were thereafter to be made by the Secretary of the Interior. Secretaries C. Delano and Hoke Smith both made such approval and selection as Secretary of the Interior.

The second specification of error seems to be based upon the theory that lieu lands under the act of 1859 could only be selected by an executive officer of the United States, viz., the Secretary of the Treasury; that the selection in controversy was not made by such officer; that therefore the selection made by the county commissioners was void.

As above suggested, the duty of making selections un-

der the act of February 26, 1859, supra, devolved upon the Secretary of the Interior. Act of March 3, 1849; 9 Stat., 395. *Todd v. State*, 24 Land Decisions, 106. The selection was so made, by the act of approval by Delano, Secretary of the Interior, in 1872.

It will be noticed the acts of 1853 and 1859 were alike in this; that under both, selections of lieu lands were allowed to supply deficiencies caused by settlement prior to survey. The stipulated facts show that the selections were made by Lewis as agent, etc., "under an act of Congress approved March 2, 1853, and an act of Congress approved February 26, 1859." The necessary conclusion from this stipulation is that the selection was made to compensate for deficiencies *caused by settlement* on school sections prior to survey, and not to compensate for deficiencies resulting from *natural causes*.

The selection was therefore properly made by the county commissioners.

It is submitted that there is nothing in the record to justify the statement found on page 7 of brief of plaintiff in error that the selection was made "because parts of sections 16 and 36 of that township were fractional in quantity, a portion of each being occupied by Lake Washington." The State Court of the State of Washington found that the selection in question was made to compensate for loss by reason of settlement on sections 16 and 36, as shown by the language used in its opinion (p. 10, Transcript of Record, *supra*).

It also seems plain that the act of 1859, as well as that of 1853, applied to Washington Territory. That is the view of the state supreme court; p. 8, Transcript of Record. Was it intended by the act of 1859, to give all other states and territories the right to lieu land to compensate for deficiencies by reason of natural causes, and to exclude the Territory of Washington from a like consideration? Both acts may be properly construed as applicable to Washington Territory; there is no necessary conflict between them. It is true that under the act of 1853 selections to compensate for deficiencies in school sections by reason of settlement thereon prior to survey are to be made by the county commissioners, and that under the act of 1859 the Secretary of the Interior may make such selections; but so far the acts are merely cumulative. If the county commissioners make such selections before the secretary does, that ends it. The secretary always knows what selections are made by the county commissioners because he must approve the selections, and the records in his office always show the school sections in lieu of which selections have been made by the county commissioners and there is therefore no danger of double selections.

Most if not all of the questions involved in this case have been passed upon and decided adversely to the contentions of plaintiff in error by the Secretary of the Interior. The acts of 1853 and of 1859 and the Enabling Act of February 22, 1889, (25 Stat. 676) admitting Washington Territory to statehood, have been construed in the

case of Levi Jerome, et al., reported in the 12 Decisions of the Department of the Interior, at page 165. After referring to the act of 1853 it was said: "This," (act of February 26, 1859; 11 Stat., 385) "was a general act, applying to all the states and territories, and by it the county commissioners of Washington Territory were authorized to locate lieu lands from additional bases." The same point was decided in the same way in the Wheeler case, decided by the department of the interior October 13, 1890, 11 Land Decisions, 381. From the case last cited it will also appear that it has never been considered that the Enabling Act of February 22, 1889, repealed the act of 1853 or that of 1859. The case of *Sharpstein v. State of Washington*, 13 Land Decisions, 378, as well as the case of *John W. Bailey et al.*, 5 Land Decisions, 216, holds that the act of February 26, 1859, is a general provision applicable alike to all states and territories, and authorizes the territory of Washington to select indemnity lands to cover deficiencies caused by the reserved sections being covered in part by permanent bodies of water, and that the land thus selected is not released from reservation by the act providing for the admission of said territory into the Union. Also that the authority conferred upon county commissioners in Washington Territory to locate school indemnity selections may be properly exerised through a duly authorized agent of said commissioners, whether such indemnity selections are made because of prior settlement on sections 16 and 36 or because of said sections being de-

ficient from any natural cause whatever. To same effect Smith's case, 11 Land Dec., 382.

We contend, therefore:

First. That lieu land selections under the act of 1859 might be made by the county commissioners or by their duly authorized agent.

Second. That in view of the act of 1849 creating the department of the interior, the selection of lieu lands under the act of 1859 might be made by the Secretary of the Interior and that his approval of selections made by a duly authorized agent of the county commissioners was in fact a selection by the Secretary of the Interior.

Third. That the act of 1859 applied to Washington Territory and that the selections were properly made thereunder.

The third specifications of error, namely, that the state supreme court erred in deciding that the State of Washington was on the 13th of March, 1893, seized in fee and possessed and entitled to the possession of the land in controversy is, the one most strongly relied upon by plaintiff in error and as we view the case is the only one upon which there can be any possible question.

It seems to be contended by plaintiff in error that inasmuch as the acts of 1853 and 1859 simply reserved this lieu land and as the same was not specifically granted by

the Enabling Act, the reserved land was again thrown open into the public domain and the state has no title. Plaintiff in error proceeds upon the theory that the state must recover on the strength of its own title and not upon the weakness of that of its adversary. We do not dispute this doctrine but under our statute plaintiff may recover either upon a legal or equitable title.

Secs. 5500 and 5508, Ballinger's Code. Opinion p. 7 Transcript.

It has never been the practice to patent to the state school lands or lands selected in lieu thereof. The title to lieu lands vests in the state by the selection and approval. 18 Land Dec. 493.

Even if the decision of the Utah territorial supreme court (United States v. Elliott, 12 Utah, p. 119), or the decision of the territorial supreme court of Washington (Barkley v. The United States, 3 Wash. Ter. 522) is correct, they are not in point because they were both rendered while Utah and Washington were still territories. They can hardly have any application to the case at bar for the reason that the Enabling Act of 1889 admitting Washington Territory as a state was in fact a grant to the state of the lands selected and reserved under the acts of Congress of 1853 and 1859.

The federal courts have decided that a reservation is in itself an appropriation for a trust purpose.

Trustees Vincennes v. Ind., 14 How., 273-4;
Wilcox v. Jackson, 13 Peters, 498.

The reservation and selection under the acts of 1853 and 1859 have the same force and effect as a grant.

Bailey Case, 5 Land Dec., 216, at p. 218.

Construing the acts of 1853, 1859 and the Enabling Act of 1889 together it is quite plain that these reserved lands were granted to the state.

The reservation made by the selection of the land in controversy while the territorial government existed continues until the selection is cancelled.

Wheeler Case, 11 Land Dec., 381, at p 382;
Smith's Case, 11 Id., 382.

The reservation made by said selection, has never been cancelled, but on the contrary, confirmed, and the land so reserved, granted, as appears by the act of Congress quoted below.

But whether that is true or not it seems to us that the act of Congress which became a law at the last session of the Fifty-seventh Congress just ended, places the principal question in this case beyond all controversy. It is not possible for us to refer to the statute containing this bill as the same has not yet been published, but a true copy of it is as follows:

"A BILL

"Relating to grants of land to the Territory and State of Washington for school purposes.

"Whereas by the Act of Congress of February twenty-second, eighteen hundred and eighty-nine, providing that the inhabitants of the Terrotory of Washington might, upon certain conditions prescribed in said Act, become the State of Washington, certain lands were granted to the said State for School purposes; and

"Whereas a doubt has arisen as to what lands were granted by section ten of said Act; and

"Whereas by section twenty of the Act of Congress of March second, eighteen hundred and fifty-three, entitled 'An act to establish the Territorial government of Washington,' the county commissioners of counties in said Territory were authorized to locate and select certain lands in lieu of sections sixteen and thirty-six occupied by actual settlers; and

"Whereas by the Act of Congress of February twenty-sixth, eighteen hundred and fifty-nine, entitled 'An act to authorize settlers upon sixteenth and thirty-sixth sections who settled before the surveys of public lands to pre-empt their settlements,' certain lands were appropriated for school purposes in lieu of such as might be patented by pre-emptors, and to compensate deficiencies for school purposes where said sections sixteen and thirty-six were fractional in quantity or where one or both were wanting by reason of the township being fractional or from any natural cause whatever, and providing for their selection; and

"Whereas certain lieu lands have been selected by the Territory of Washington under said Acts of Congress; Therefore,

"Be it enacted by the Senate and House of Representa-

tives of the United States of America in Congress assembled, That in all cases where sections sixteen and thirty-six or either or any of them or any portion thereof have been occupied by actual settlers prior to survey thereof, and the county commissioners of the counties in which said sections so occupied as aforesaid are situated have, under this Act of Congress of March second, eighteen hunderd and fifty-three, located or selected other lands in sections or fractional sections, as the case may be, within their respective counties in lieu of said sections so occupied as aforesaid, the lands so located or selected, when the same have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State by said Act of February twenty-second, eighteen hundred and eighty-nine, and said lands so selected and located are hereby granted to the said State of Washington and the title of said State thereto is hereby confirmed.

"Sec. 2. That where any lands appropriated by Congress to said Territory to compensate deficiencies for school purposes where sections sixteen or thirty-six were fractional in quantity, or where one or both were wanting by reason of the township being fractional, or from any natural cause, whatever, or where section sixteen or thirty-six were patented by pre-emptors, have been selected and appropriated as provided in said Act of Congress of February twenty-sixth, eighteen hundred and fifty-nine, the lands so selected and appropriated, when the same have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State of Washington, by the said Act of February twenty-second, eighteen hundred and eighty-nine, and said lands so selected and appropriated are hereby granted to said State and the title thereto confirmed."

Under this law the lands in controversy selected were granted to the state by the Enabling Act in 1889. They have therefore been the property of the state ever since it was admitted into the Union and the state has ever since said time had the fee simple title. The court will not do a vain thing. If this case should be decided adversely to the state on the technical ground that the state had no title at the time the action was commenced, nevertheless under the act just quoted, the state could immediately bring suit against the plaintiff in error and eject him from the premises. The lands in controversy being reserved and not open for entry, the settlement of plaintff in error thereon is a mere trespass; and there is nothing to prevent the late Act of Congress from being given full force and effect.

Plaintiff in error contends that the effect of section 10 of the Washington Enabling Act and of the following portion of section 17 of the same act, "That the states provided for in this act shall not be entitled to any further or other grants for any purpose than as expressly provided in this act," was to restrict the grants for school purposes as provided by the acts of 1853 and 1859. The Levi Jerome Case, 12, Land Dec., 165, fully discusses this point. The above quoted section 17, the secretary says, "Relates more directly to the several grants made to the four states admitted into the Union in lieu of the provisions contained in the act of September 4, 1841 (5 Stat. 453) and of the act of September 28, 1850 (9 Stat. 519).

To construe the Washington Enabling Act as restricting lieu lands for school purposes, provided for in the act of 1859, would be to assume that Congress made less provision for the four new states than for the other states in the Union.

Under sections 10 and 11 of the Enabling Act sections 16 and 36, whether surveyed or *unsurveyed*, were granted to the state. Under the provisions of the acts of 1853 and 1859 those sections if settled upon while unsurveyed were subject to the claims of the settler. In this respect the act of 1889 differs from the preceding ones. It may also differ from them in other minor respects, but such difference can not have the effect to entirely repeal the former acts.

The State of Washington may have recognized its right to lieu lands under the terms of section 10 of the Enabling Act but so far as we are able to discover it has never done anything in recognition of the contention of the plaintiff in error that lands selected under the acts of 1853 and 1859 do not belong absolutely to the state in perpetual trust for the common schools.

Buckley Case, 4 Land Decisions, 390.

The concluding part of section 19 of the Washington Enabling Act is as follows:

"And there shall be deducted from the number of acres

of land donated by this act for specific objects to said states, the number of acres in each heretofore *donated* by Congress to said territories for similar objects."

Congress evidently looked upon the grant and reservation made by the organic act as in the nature of a donation, title to which had already passed and the clause just quoted was put in to protect the United States from having other selections made in addition to those already completed.

The reserved lands being held by the territory in perpetual trust for the common schools, could Congress pass any law that would effect the trust? See *State of Minnesota v. Batchelor,* 1 Wall, 109.

The court in the case of *Wilcox v. Jackson,* 13 Peters, at page 513, say:

"But we go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it."

The land in question having been donated and appropriated in perpetual trust for the common schools of the territory and of the states to be created therefrom, it was wholly unnecessary for the Enabling Act to make a specific grant of them.

The second subdivision of Art. 26, Constitution of Washington provides, "That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state * * *" It is not placing a strained construction upon this provision to say that it was an assertion of title to the land theretofore appropriated and reserved by the acts of 1853 and 1859 for the use of common schools.

Nor do we think that any of the acts of Congress or of the Territory of Washington with respect to Washington university lands show any construction whatever by Congress or Washington Territory of the acts of 1853 and 1859.

All of the property of the Territory of Washington passed to the new state, including the lieu lands selected and reserved. While it is true that the Enabling Act does not specifically grant these reserved lands, it is also true both Congress and the State in its constitution assumed that the lands reserved under the acts of 1853 and 1859 passed to the state by the Enabling Act and were included in the grant of sections 16 and 36.

In order to sustain the contention of plaintiff in error the court must hold that the federal government, more than fifty years ago, attempted to create a trust for the benefit of the school children then living or thereafter to live in Washington, which intent was never questioned for forty years, but by reason of a technical failure to use

certain direct language in the Enabling Act the court will refuse to enforce it.

It will also be remembered that the expense of making these selections and of maintaining them has been paid by the Territory and State of Washington. These facts ought to preclude the plaintiff in error from prevailing on the technical plea made against the existence of a trust. He is in no sense an innocent purchaser, but has had notice at all times.

A large amount of land was selected during territorial days under the acts of 1853 and 1859; the state has assumed to be the owner of all these lands so selected and has conveyed to innocent purchasers a large amount thereof. A decision adverse to the state would unsettle all of these titles which the citizens of the State of Washington have for the past ten years or more considered good. It is respectfully submitted that the decision of the supreme court of the State of Washington should be affirmed.

Respectfully submitted,

W. B. STRATTON, Attorney General,
Attorney and Counsel for Defendant in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1902.

ANTON JOHANSON,
Plaintiff in Error.

vs.

THE STATE OF WASHINGTON,
Defendant in Error.

NO. 282.

In Error to the Supreme Court of the State of Washington

Supplemental Brief for Defendant in Error.

W. B. STRATTON, Attorney General,
Attorney and Counsel for Defendant in Error.

The selections made by the county commissioners and approved by Secretary Delano in the year 1872, under the acts of 1853 and 1859, operated at least as a reservation of the land question.

This reservation has never been destroyed, nor

has the land ever become a part of the public domain subject to entry by settlers.

Wilcox vs. Jackson, 13 Pet. 513.

Leavenworth &c., Ry. Co. vs. U. S., 92 U. S. 745.

No department of the United States and no court has recognized the right of Johanson to enter the land under the public land laws. The land having been since 1872 reserved from entry, Johanson, since he entered in 1893, has been a willful trespasser and of course could gain no rights by reason of having placed improvements upon the land. If he could, then a trespasser may plead his wrongful act to establish a title. He was at all times conclusively presumed to know that the land he settled upon was reserved and therefore not open for settlement. In fact he has never claimed that the fact of placing improvements on the land gave a superior right. The sole basis of his claim is that the land in 1893 was subject to entry.

It is claimed by plaintiff in error that the enabling act of 1889 cancelled the reserve created by the selection and approval of 1872. We submit that the enabling act cannot fairly be so construed. The most that can be said is that only a part of the land theretofore reserved, was granted by the enabling

act to the state for common school purposes. Assuming that only sections 16 and 36 were so granted, what became of the balance of the reserve? No provision of the law turns it back into the public domain; and if this is true, then it remains as a continuing reserve not subject to entry. See cases supra. Suppose a thousand acres of public land were reserved as a military reservation and that ten years after its creation an act of Congress were passed granting the EAST half of it to the state in which it was located. What would become of the west half? Clearly, it would still be a military reserve. But under the reasoning of plaintiff in error the west half would thereby be discontinued as a reserve, and thrown open to entry. If, then, the land in controversy continued to be reserved after the passage of the enabling act, and therefore not subject to the entry of Johanson, what effect should be given to the act of congress passed in the year 1891, 26 Statutes at Large, page 796? It is claimed by plaintiff in error that the enabling act authorized lieu selections only in case sections 16 and 36 had been settled upon prior to survey. We think the enabling act should be construed with the acts of 1853 and 1859, and if this is done then

lieu selections might be made on account of deficiencies arising from natural causes.

See Sharpstein vs. State, 13 Land Dec. 378.

John W. Bailey, 5 Land Dec. 216.

Smith's case, 11 Land Dec. 382.

But the act of 1891, supra, makes this point clear. Under it the state might make selections in lieu of sections 16 and 36 "where one or both are wanting by reason of the township being fractional, or from any natural cause whatever." After the passage of the act of 1891, under it the state did select from the land already in a state of reserve under the acts of 1853, 1859 and 1889, the land in controversy. This then passed title to the state, even if it never had it before.

See Approval of Commissioner and of Secretary of Interior, made in 1895, pages 7 and 8 first brief herein of defendant in error, where it is expressly found that the lands in question are embraced in a list of lands selected "by a duly authorized agent of the state." So this land must have been also selected by the state, under the act of 1891, and if this is true then the state has title. Johanson never had any claim superior to a selection made by the state under the act of 1891, because the land has been at least in a state of reserve since 1872, and at

all times since subject to the absolute control of congress.

We wish to disclaim any intention to misquote the act of the 57th congress, set forth on pages 16 and 17 of our original brief. We ask the court to examine the act, which is not at this time accessible to us. The state also disclaims any attempt to "steal" the property of Johanson. The property never belonged to him, and it is the duty of the state to put the question of title beyond controversy, for the benefit of the common schools. But even if the said act of congress was amended in the respects claimed by plaintiff in error, such amendment is immaterial for the act even with the amendment, confirmed the title in the state and declared that the title had passed to the state by the enabling act of 1889.

The intent of congress to reserve this land for and to grant it to the state, for the use of schools, cannot be mistaken when all these acts are considered, and we cannot believe that the court will hold that congress has failed to carry out the intent which so plainly appears, by placing upon the acts of congress the technical, strained and narrow construction contended for by plaintiff in error, for the subject of these acts of congress is one with reference

to which the utmost liberality has always been exercised.

The United States and the State of Washington are both satisfied with the methed of selection, as declared in the decisions of the Secretary of the Interior heretofore cited, and it does not lie with a mere trespasser to question the regularity of such selection.

Again, the act of 1859 did more than reserve the land in question; it "pledged" and "appropriated" it. And the lands by that act "appropriated, shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of congress of May 20, 1826, * * * "

The act of May 20, 1826, provided that the lands selected "shall be held by the same tenure and upon the same terms for the support of the schools in such township, as section number sixteen is, or may be held, in the state where such township shall be situated.

There is no doubt but what sections sixteen and thirty-six are owned by the State of Washington absolutely, and the lieu lands selected pursuant to the acts of 1859 and 1826 are held "by the same tenure," and it seems to me that there can be no

more question about title to lieu lands than there can be to the title to section sixteen.

It is claimed by plaintiff in error that the act of 1859 was not applicabble to the Territory of Washington. It is sufficient to say that the act of 1859 was simply an enlargement of the act of 1853; was general in its nature and applicable to all the states and territories. But whether the act of 1859 applied to the Territory of Washington is immaterial, because as stated in our original brief it conclusively appears from the stipulation of the parties and the findings of the courts that the land in question was selected on the basis common to both the acts of 1853 and 1859, namely, on account of the school sections having been settled upon prior to survey by persons entitled thereto.

We contend that section 10 of the enabling act granted to the state all the lieu lands theretofore selected. It will be noticed that the grant of sections 16 and 36 was not "in lieu" of any previous grants or reservations, but was rather confirmatory of them. Other grants were made by the enabling act "in lieu" of the swamp land grant, the grant for internal improvements, and the grant of saline lands previously made by congress and which were applicable to the Territory of Washington. (Sec.

17, Enabling Act of 1889). This it seems to me, shows a clear intent on the part of congress to grant to the state land that had theretofore been held in reserve for the common schools.

The position of plaintiff in error is that the act of 1889 repealed the acts of 1853 and 1859. If it repealed those particular acts it also repealed all other acts which had theretofore been passed by congress making reservations or grants to the Territory of Washington for educational purposes. That it did not have the effect claimed we think is clear. For instance, it did not repeal the act of congress of June 2, 1862, (12, Stat. at Large, 503) entitled, "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," and the acts supplemental thereto, because the conditions which attached to the grant made by the act of 1862 continue to be a part of the conditions under which the state holds agricultural lands by virtue of the grant thereof made by the enabling act of 1889.

See also, State ex rel Koch vs. Barrett, 26 Mont. 62.

The list approved in 1895 recites: "Approved list No. 1 of school indemnity lands exhibiting the

tracts of public lands situate in the district of lands to which such townships are entitled have not been granted in place, and which selections are provided for in the act of congress approved March 2, 1853, entitled 'An act to establish the territorial government of Washington.' The act approved February 26, 1859, entitled 'An act authorizing settlers upon sixteenth and thirty-sixth sections who settled before survey of the public lands to pre-empt their settlements,' embodied in sections 2275 and 2276 of the revised statutes of the United States."

Under the head "Date of Selection," and "No. of List," in said list approved in 1895, it also appears that the land in question was selected "May 24, 1870," by List No. "2."

Lands in List No. 2 were selected by Lewis May 20, 1870, so the approval of 1895, under the cases cited, related back to the old selection of 1870. The "Approved list No. 1," etc., embodied list No. 2 made by Lewis in 1870, with other old lists. There is no reason why the approval of list in 1895 should not relate back to date of original selection because no rights could have intervened for the reason that the land was during all of the time reserved from entry.

Moreover, the state showed title by reason of the approval of 1895. If plaintiff in error claims that such approval could only relate back to a selection made subsequent to March 26, 1890, (See plaintiff in error's reply brief, p. 4) or subsequent to the act of congress of 1891, then the burden was on him to show that his settlement was prior to that selection. This he failed to do. In other words, the state showed title and Johanson failed to establish any claim against such title. So whether the aproval of 1895 amounting to an entirely new selection dating from the time the list was filed after act of Washington legislation of March 26, 1890, or after the act of congress of 1891, or whether it related back to the original list filed in 1870, is wholly immaterial. The case at bar we think does not fall within the principles of Barkley vs. The State of California, 6 Land Decision 699, assuming that case not to have been overruled.

The approval of 1895, which saved any valid interfering rights is no protection to plaintiff in error for he had none; the approval recognized none which were not valid.

The act of December 20, 1902, confirmed the title in the state and it makes very little difference under

what particular laws, or selection, or approval the title passed to the state. We think that congress, even when land is not in a state of reserve, may grant the same and a settler thereon who has not perfected his title, has no claim to the land thus granted as against the grantee of the United States. The State of Washington is such grantee.

It is respectfully submitted that the decision of the state supreme court should be affirmed.

W. B. STRATTON,
Attorney General, Washington.

Supreme Court of the United States.

No. 282.—October Term, 1902.

Anton Johanson, Plaintiff in Error, vs. The State of Washington. } In error to the Supreme Court of the State of Washington.

[June 1, 1903.]

This was an action of ejectment brought in the Superior Court of King County, Washington. The case was tried by the court without a jury. An agreed statement of facts was submitted, upon which the court found the following facts and conclusions of law:

"1. That the north half of the southwest quarter and the northwest quarter of the southeast quarter of section 3, township 25 north, range 4 east, is of the value of twenty thousand dollars, and was selected by Phillip H. Lewis, as agent for King County, Washington Territory, by filing a list of this and other lands designated as list No. 2 of indemnity school selection at the land office at Olympia, Washington Territory, May 24, 1870, under an act of Congress approved March 2, 1853, and an act of Congress approved February 26, 1859, which said selection was approved by Secretary C. Delano, January 27, 1872.

2. March 13, 1893, Anton Johanson made application to enter the land aforesaid under the homestead laws, and at that time made a settlement thereon; he has ever since lived on said land; his application was rejected by the local land office, and subsequently appealed to the Commissioner of the General Land Office, and finally to the Secretary of the Interior, who, on December 18, 1895, decided adversely to Anton Johanson.

From the foregoing facts the court finds as conclusions of law:

1. That the plaintiff was on the 13th day of March, 1893, seized in fee and possessed and entitled to the possession to said north half of the southwest quarter and the northwest quarter of the southeast quarter, section 3, township 25 north, range 4 east.

2. That on the said 13th day of March, 1893, defendant unlawfully entered said premises and ejected the plaintiff therefrom, and unlawfully retains possession thereof."

The judgment of the Superior Court having been affirmed by the Supreme Court of the State, (26 Wash. 668,) the case was brought here on error.

Mr. Justice Brewer delivered the opinion of the Court.

Under the statutes of Washington an action in form similar to the old action of ejectment may be maintained in favor of one who has a superior title, whether legal or equitable. (Ballinger's Code, secs. 5500, 5508.)

No patent is shown to have been issued by the General Government, and the question, therefore, is whether the State obtained an equitable title by virtue of the selection and approval disclosed in the findings of fact.

The first contention of plaintiff in error is that no authority is shown for Phillip H. Lewis to act as agent for King County or the Territory of Washington in making the selection. We pass the assertion that in the brief of counsel for plaintiff in error in the State court the right of Lewis to act for the county was conceded. It is enough that Lewis, assuming to act as agent, made the selection, and that his selection was approved by the Secretary of the Interior, for the State, the successor of the Territory, by commencing this action and claiming the benefit of his act as agent, ratified and confirmed what he did as agent. Besides, whether he had authority to so act is not a Federal question, but one whose decision by the State court is final.

Coming now to the Federal question, the approval by the Secretary of Interior of a selection made by one claiming to be the agent of a Territory or State of land in lieu of school sections 16 and 36 is, if nothing more, in effect a withdrawal from private entry of the selected land, and such withdrawal continues until the approval of the selection is itself set aside. Whether such selection, so approved, shall afterwards ripen into a full legal title or not, is immaterial so far as the question of withdrawal is concerned. In the case at bar, at the time of the selection and approval, there was no settlement, no private right, nothing to interfere between the United States and the Territory of Washington, or prevent a selection of this tract in lieu of an ordinary school section. When, therefore, the Secretary of the Interior approved the selection, it at least operated to withdraw the land from private entry. A claim in behalf of the Territory had been presented, and that claim had been approved by the proper officer of the United States. While the land remained subject to such claim and approval, no individual could come in and question its validity. Johanson's attempt to make a homestead was wrongful and gave him no rights whatever in the land.

But, further, the title of the State is good. For the material parts of the statutes bearing upon this question see note at foot of this page.*

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*Act March 2, 1853, establishing the Territory of Washington, (10 Stat. 179, sec. 20, sec. 1947, R. S.):

"Sections numbered sixteen and thirty-six in each township in said Territory, shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory. And in all cases where sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the county commissioners of the counties in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands,

Now we remark that from the legislation of Congress nothing is clearer than that the policy of the Government has been a generous one in respect to grants for school purposes. (*Cooper* v. *Roberts*, 18 How. 183; *Minnesota* v. *Hitchcock*, 185 U. S. 373, and cases cited in the opinion.) And, as was said by Mr. Justice Field, in *Winona & St. Peter R. R. Co.* v. *Barney*, (113 U. S. 618, 625,) acts making grants "are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

Tested by this rule, it is obvious that Congress intended that Washington should receive full sections 16 and 36, or, in case of a failure by reason of prior settlement or from natural causes, the equivalent of such sections, and designated the Secretary of the Interior as the officer to approve any selections made by the Territory. The act of 1859 is as applicable to Washington as to any other Territory, notwithstanding that there was a special statute passed in 1853 in respect to it. While ordinarily a special law is not repealed by a subsequent general statute, unless the intent so

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to an equal amount in sections or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied."

Act of February 26, 1859 (11 Stat. 385):

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That where settlements, with a view to pre-emption, have been made before the survey of the lands in the fields which shall be found to have been made on sections sixteen or thirty-six, said section shall be subject to the pre-emption claim of such settler; and if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors; and other lands are also hereby appropriated to compensate deficiencies for school purposes, where said sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever: *Provided*, That the lands by this section appropriated, shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of Congress of May twentieth, eighteen hundred and twenty-six, entitled 'An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for.'"

Section 2 of the act of Congress approved May 20, 1826 (4 Stat. 179):

"SEC. 2. *And be it further enacted*, That the aforesaid tracts of land shall be selected by the Secretary of the Treasury, out of any unappropriated public lands within the land district where the township for which any tract is selected may be situated; and when so selected, shall be held by the same tenure, and upon the same terms, for the support of schools in such township, as section number sixteen is, or may be held, in the State where such township shall be situated."

Section 10 of the act of February 22, 1889, for the admission of Washington and other Territories into the Union (25 Stat. 679):

"That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where

to do is obvious, yet there is no rule which prevents the latter from applying to cases not provided for by the former. It is true the act of 1859 refers to the act of 1826 in reference to selections, and the act of 1826 designated the Secretary of the Treasury as the officer to select. At that time the Land Department was under the supervision of the Secretary of the Treasury. But by the act of March 3, 1849, (9 Stat. 345,) the Interior Department was created, and the supervising powers of the Secretary of the Treasury in respect to public lands were transferred to the Secretary of the Interior. The act of 1859 is to be taken, not as specially designating the Secretary of the Treasury as the officer to make the selections, but simply as describing the general mode of procedure in respect thereto. This is obvious from its language, which is that the selection and appropriation shall be "in accordance with the principles of adjustment and the provisions of the act of Congress, May 20, 1826."

Further, it must be remembered that the general supervision of the affairs of the Land Department is now vested in the Secretary of the Interior, and that unless Congress clearly designates some other officer to act in respect to such matters it will be assumed that he is the officer to represent the Government. (*Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155.)

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such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior."

(32 Stat. 756. Dec. 18, 1902.)

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases where sections sixteen and thirty-six, or either or any of them, or any portion thereof, have been occupied by actual settlers prior to survey thereof, and the county commissioners of the counties in which said sections so occupied as aforesaid are situated, have under said act of Congress of March second, eighteen hundred and fifty-three, located or selected other lands in sections or fractional sections, as the case may be, within their respective counties, in lieu of said section so occupied as aforesaid, the lands so located or selected, when the same shall have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State by said act of February twenty-second, eighteen hundred and eighty-nine, and the title of said State thereto is hereby confirmed.

"SEC. 2. That where any lands appropriated by Congress to said Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six were fractional in quantity, or where one or both were wanting by reason of the township being fractional, or from any natural cause whatever, or where sections sixteen or thirty-six were patented by pre-emptors, have been selected and appropriated as provided in said act of Congress of February twenty-sixth, eighteen hundred and fifty-nine, the land so selected and appropriated, when the same shall have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said State of Washington by the said act of February twenty-second, eighteen hundred and eighty-nine, and the title thereto confirmed,"

If some one authorized to represent the Territory of Washington made a selection, and it was approved by the Secretary of the Interior, such action, being that of the officer charged with the supervision of the landed interests of the United States, should, unless some direction of Congress has manifestly been violated, be held to be conclusive upon the transfer of title.

But still further, it appearing that some question had been mooted as to the intent of Congress in respect to these matters the confirmatory statute of 1902 was enacted, and that obviously removes all doubt. It confirms the title to selected lands "when the same shall have been approved by the Secretary of the Interior." This does not refer alone to future action by the Secretary, but ratifies that which he has already done. He has approved this selection, and the act of 1902 places the title of the State beyond controversy.

For these reasons we think the judgment of the Supreme Court of Washington is right, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.